# In the Supreme Court of the United States

OCTOBER TERM, 1948

No. —, Original

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF TEXAS

## MOTION FOR LEAVE TO FILE COMPLAINT

The United States of America, by its Attorney General and its Solicitor General, asks leave of the Court to file its complaint against the State of Texas submitted herewith.

TOM C. CLARK,
*Attorney General.*

PHILIP B. PERLMAN,
*Solicitor General.*

DECEMBER 1948.

## STATEMENT IN SUPPORT OF MOTION

The United States seeks to bring this suit against the State of Texas under the authority of Article III, Section 2, Clause 2 of the Constitution of the United States. The purpose of the litigation is to establish the rights of the United States to the lands, minerals and other things un-



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derlying the Gulf of Mexico adjacent to the coast of Texas, seaward of low-water mark along the coast and outside the bays, rivers, lagoons and other inland waters. The seaward limit of the area described in the complaint filed herewith is specified as the outer edge of the continental shelf, this being the seaward boundary of the State of Texas as described by Act of its legislature (Act of May 23, 1947, General Laws 1947, page 451), within which the State asserts "full and complete ownership" of the bed of the Gulf of Mexico (Act of May 16, 1941, General Laws 1941, page 454).[1]

The rights of the United States in the lands underlying the Pacific Ocean adjacent to the State of California were established by this Court in *United States* v. *California,* 332 U. S. 19. It is the position of the United States that the rule there announced is equally applicable to the sea bed and subsoil of the Gulf of Mexico adjacent to Texas.

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[1] Prior to 1941, the seaward boundary of the State of Texas was described as a line "three leagues from land" (Act of December 19, 1836, 1 Houston Laws of the Republic of Texas (1838), p. 133). The act of the legislature of May 16, 1941 (General Laws, 1941, page 454) purported to fix and declare the gulfward boundary of the State as "a line located in the Gulf of Mexico parallel to the three (3) mile limit * * * * located twenty-four (24) marine miles further out in the Gulf of Mexico than the said three (3) mile limit." By the act of May 23, 1947 (General Laws, 1947, page 451) the 1941 act was amended so as to move the purported gulfward boundary of the State to the "farthermost edge of the continental shelf from the Gulf Shore line."

The circumstances under which the State of Texas entered the Union are in certain respects different from those under which the State of California was admitted. But to the extent that any of those differences are relevant at all, they point even more clearly to paramount rights in the United States. The territory occupied by the State was not acquired by the United States by conquest or purchase but was held by the independent Republic of Texas. By the Joint Resolution of March 1, 1845, 5 Stat. 797, the Congress consented "that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State * * * in order that the same may be admitted as one of the States of this Union". This consent was made subject to certain specified conditions, among them being the adjustment by the United States of all questions of boundary that might arise with other governments, the cession to the United States by Texas of "all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said Republic of Texas" after which the State should retain "all the public funds, debts, taxes, and dues of every kind, * * * and * * * all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas * * *". In the Joint Resolution approved

December 29, 1845, 9 Stat. 108, the Congress noted that the conditions specified in the Joint Resolution of March 1, 1845, had been complied with and declared that the State of Texas was "admitted into the Union on an equal footing with the original States in all respects whatever."

Since 1919, Texas has, by statute (Act of July 23, 1919, General Laws, 2d Called Session, 1919, page 51, as amended) undertaken to provide for the leasing of lands underlying the Gulf of Mexico for the exploitation of mineral resources. Under the provisions of the legislation referred to, Texas has executed various leases covering lands underlying the open waters of the Gulf of Mexico and lessees thereunder have entered upon said lands for the purposes of exploration and drilling and have extracted from such lands quantities of petroleum and other minerals.

It is reported that certain leases covering lands underlying the Gulf of Mexico have been entered into by the State of Texas and its lessees subsequent to June 23, 1947, the date of the decision of this Court in the *California* case. Officials of the State of Texas have openly stated that they do not regard the rule announced in the *California* case as applicable to lands underlying the Gulf of Mexico adjacent to Texas and that they contemplate a continuation of the various activities of the State in connection with the development of oil and gas in those lands, in violation of the rights of the United States. Accordingly, it is believed that the

rights of the United States can be protected only by a decree of this Court granting the relief prayed for in the complaint.

It is respectfully submitted that the motion for leave to file the complaint should be granted.

TOM C. CLARK,
*Attorney General.*

PHILIP B. PERLMAN,
*Solicitor General.*

# In the Supreme Court of the United States

OCTOBER TERM 1948

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NO. —, ORIGINAL

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UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF TEXAS

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**COMPLAINT**

The United States of America, by its Attorney General and its Solicitor General, brings this suit against the defendant, the State of Texas, and for its cause of action states:

I

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States.

II

At all times herein material, plaintiff was and now is the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Gulf of Mexico, lying seaward of the ordi-

nary low-water mark on the coast of Texas and outside of the inland waters, extending seaward to the outer edge of the continental shelf and bounded on the east and southwest, respectively, by the eastern boundary of the State of Texas and the boundary between the United States and Mexico.

III

The State of Texas claims some right, title or interest in said lands, minerals and other things adverse to the United States.

IV

In the exercise of the rights claimed by it, the State of Texas has, by general law, Act of July 23, 1919 (General Laws, 2d Called Session, 1919, page 51), as amended, authorized the leasing of lands underlying the Gulf of Mexico for the exploitation of petroleum, gas and other mineral deposits in the area herein described.

V

Pursuant to that law, the State of Texas has negotiated and executed such leases with various persons and corporations, and those persons and corporations have, in violation of the rights of the United States, paid to the State substantial sums of money, entered upon said lands and drilled wells for the recovery of petroleum, gas and other hydrocarbon substances. Such wells have been producing quantities of petroleum, gas

and other hydrocarbon substances which the lessees of the State have taken and converted to their own uses and for which the lessees have paid to the State substantial sums of money in bonuses, rents and royalties reserved under the leases, but neither the State nor its lessees have recognized the rights of the United States nor have they paid to the United States either the value of the petroleum and other things taken from the area, or any royalties thereon.

VI

The State of Texas has no title to or interest in any of the lands in the area herein described, but possesses only those governmental powers which it has with respect to other lands of the United States within the lawful territorial jurisdiction of the State.

VII

The State has frequently and publicly denied the rights and powers of the United States in the area herein described and has claimed full and complete ownership of the area for itself and, unless the rights of the United States are established and declared by this Court, the State will continue to claim such ownership for itself and to exercise the rights incident to such ownership through its officers, agents, and employees, and will continue to aid, abet and encourage others, as its lessees, to trespass upon and to take and use the minerals and other things of value in the area,

in violation of the rights of the United States, from which the United States will suffer irreparable injury, and for which it has no adequate remedy except by this action.

Whereof, plaintiff prays that a decree be entered adjudging and declaring the rights of the United States as against the State of Texas in the area herein described, enjoining the State of Texas and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States, and requiring the State of Texas to account to the United States for all sums of money derived by it from the area herein described subsequent to June 23, 1947.

TOM C. CLARK,
*Attorney General.*
PHILIP B. PERLMAN,
*Solicitor General.*

DECEMBER 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948

# In the Supreme Court of the United States

OCTOBER TERM, 1948

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NO. __, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF TEXAS

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**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT**

The State of Texas has raised two objections to the granting of the motion of the United States for leave to file its complaint herein. These objections suggest (1) that the Attorney General has no authoriy to bring this sui. and (2) that the interests of convenience, efficiency and justice would be better served by the bringing of the suit in an appropriate district court rather than as an original proceeding in this Court.

1. Any doubt which may have existed as to the authority of the Attorney General to institute a suit of this character was disposed of by the Court in *United States* v. *California,* 332 U. S. 19, 26–29. The statement of the State of Texas in regard to this matter presents no consideration which



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was not before the Court in the *California* case and no ground for reaching a different conclusion in respect to the Attorney General's "statutorily granted power to invoke * * * [the Court's] jurisdiction in this federal-state controversy." 332 U. S. at 28–29.

2. There is also no basis for the suggestion that it would be more convenient and efficient to bring this suit in a district court rather than in this Court. Certainly, the fact that the district courts now have concurrent original jurisdiction with this Court in respect to suits brought by the United States against a State (28 U. S. C. 1251 (b) and 1345), does not, in itself, support such a conclusion.

The amendment to the Judicial Code which gives the district courts concurrent original jurisdiction with this Court serves a useful purpose. There may be controversies of very limited importance between the United States and a State that could be satisfactorily resolved in the lower courts without burdening this Court. On the other hand, there may be controversies of the first magnitude in importance, such as the present suit, in which it is appropriate for this Court to exercise its original jurisdiction, and in which it would be highly inappropriate to proceed before a district judge. Where, as here, the United States seeks the adjudication of issues of far reaching importance, both to the State and to

the Nation as a whole, all considerations of public policy, as well as of convenience and efficiency, make it desirable for this Court to exercise the original jurisdiction conferred by Article III of the Constitution. There is no apparent reason why the basic issues in this case cannot be determined by this Court as they were in the comparable case of *United States* v. *California*. We know of no matters of relevant fact that call for the taking of testimony or presentation of evidence in this case any more than in the decision of the basic issues in the *California* case. If, contrary to our expectations, any such issues should arise, they can be resolved in the manner usually employed by this Court in original proceedings. There is no sound reason for departing from the procedure followed in the *California* case.

In view of the foregoing, the motion for leave to file the complaint herein should be granted.

TOM C. CLARK,
*Attorney General.*

PHILIP B. PERLMAN,
*Solicitor General.*

JANUARY, 1949.

U. S. GOVERNMENT PRINTING OFFICE 1949

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# In the Supreme Court of the United States

OCTOBER TERM, 1948

No. ——, Original

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF TEXAS

## BRIEF FOR THE UNITED STATES IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

### STATEMENT

The purpose of this motion is to invoke the original jurisdiction of this Court to obtain an adjudication of the rights of the United States, as against the State of Texas, in the lands, minerals and other things underlying the Gulf of Mexico adjacent to the coast of Texas. The State of Texas opposes the granting of the motion on the grounds (1) that the Attorney General of the United States has no authority to institute this suit because the Congress has not, in the first instance, asserted the rights alleged against the State of Texas, and (2) that the interests of convenience, efficiency and justice will be better served by the bringing of the suit in

a district court, with customary appellate review, rather than as an original proceeding in this Court.

The State of Texas does not suggest the absence of a case or controversy requiring adjudication (cf. *United States* v. *California,* 332 U. S. 19, 24–26), nor does it question the right of the United States to seek a resolution of this controversy through judicial proceedings (cf. *United States* v. *Texas,* 143 U. S. 621). Its objections to the granting of the motion are limited to those set forth above. As we shall show, neither of these objections presents to the Court a reason for declining to entertain the proposed litigation.

## I

### The institution of this proceeding is within the authority of the Attorney General

In the assertion that the Attorney General has no authority to bring this suit because the Congress has not by specific enactment asserted the rights alleged against the State of Texas (Objections to Motion, pp. 2–4), the Court is being requested to reconsider certain arguments and matters which were heard and disposed of in *United States* v. *California,* 332 U. S. 19. In that case, the Court found that there was nothing in the failure of the Congress on two occasions to grant to the Attorney General specific authority to institute a proceeding of this character,[1] or

[1] S. J. Res. 208, 75th Cong., 1st Sess. (1937); S. J. Res. 83 and 92, 76th Cong., 1st Sess. (1939).

in the unconsummated efforts to obtain a "quit-claim" to the several coastal States of lands underlying ocean waters beyond low-water mark,[2] or in any other matter to which the Court had been referred, which might be construed in any way as a limitation upon the general authority[3] and duty of the Attorney General "to institute and conduct litigation in order to establish and safeguard government rights and properties." 332 U. S. at 26–29.

It is abundantly clear from what was considered and decided in the *California* case that a specific assertion by the Congress of the rights of the United States in and to the lands underlying the Gulf of Mexico adjacent to Texas is not a prerequisite to the institution of the litigation which the United States here seeks to bring.[4] The rights of the United States in the lands and resources underlying ocean waters beyond its

[2] H. J. Res. 225, 79th Cong., 2d Sess. (1946), which, following approval by the Congress, was vetoed by the President. 92 Cong. Rec. 10660. The veto was sustained. 92 Cong. Rec. 10745. See also H. R. 5992, 80th Cong., 2d Sess. (1948).

[3] 5 U. S. C. 291, 309.

[4] Certain measures now pending before the Congress, to which Texas refers (Objections to Motion, p. 4), are designed merely to provide for the control and disposition of interests which have already been held to be vested in the United States. These bills, S. 923 and H. R. 341, 81st Cong., 1st Sess., relate, respectively, to the control, management and development of submerged coastal lands and to the recognition of certain equities therein resulting from operations conducted prior to the decision in the *California* case.

shores relate to its position as a national sovereign and a member of the family of nations. *United States* v. *California*, 332 U. S. 19, 34–35. These rights are an inherent part of the external sovereignty of the United States and it is the duty of the Attorney General to institute such proceedings as may be necessary to protect these as well as all other rights and interests of the United States.

## II

### The circumstances of this controversy justify the exercise of the original jurisdiction of this Court

The second objection urged by Texas suggests that the interests of convenience, efficiency and justice would be better served if this proceeding were brought in a district court, with customary appellate review, rather than as an original proceeding in this Court (Objections to Motion, pp. 5–9). In this connection, Texas asserts that it will desire to introduce a great amount of testimony and written documents; and it is urged that this evidence, documentary and otherwise, could be adduced more easily before a federal district court in Texas. We submit that, wholly apart from the probable irrelevance of such evidence, there is no basis for the course of action suggested by the State.

It is, of course, true that the district courts of the United States now have concurrent original jurisdiction with this Court over suits brought by the United States against a State (28 U. S. C.

1251 (b) and 1345) and, as the State observes (Objections to Motion, p. 5), this Court has on occasion withheld the exercise of its original jurisdiction, remitting a cause to another forum in the interests of convenience, efficiency and justice. See *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 464–465. However, as a general rule, "the grant of concurrent jurisdiction implies that, in the first instance, the plaintiff shall have the choice of the court" (*St. Louis, B. & M. Ry.* v. *Taylor*, 266 U. S. 200, 208), and, it is submitted, any deviation from this rule should be predicated only upon circumstances which establish, beyond all question, that the interests of convenience, efficiency and justice would be better served by remitting the cause to some other forum.[5] Par-

[5] Compare the considerations which were found, in each instance, to be persuasive in the recent decisions of this Court involving the principle of *forum non conveniens*. *Williams* v. *Green Bay & W. R. Co.*, 326 U. S. 549, 554–560; *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 509–512; *Koster* v. *Lumbermens Mutual Co.*, 330 U. S. 518, 520–521, 531–532. Of particular significance are the Court's observations in those cases that "each case turns on its facts" (*Williams* v. *Green Bay & W. R. Co.*, *supra*, p. 557) and "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" (*Gulf Oil Corp.* v. *Gilbert*, *supra*, p. 508. Moreover, *forum non conveniens* in the Federal courts is merely a doctrine relating to venue. See *Gulf Oil Corp.* v. *Gilbert*, *supra*, p. 507. Only the most drastic kind of situation, if any, should call for the application of like principles in denying to a plaintiff access to a court which both the Constitution and Congress have made available, and to require it to seek relief in a lower court, particularly where issues of such national importance are involved.

ticularly is this true where the original jurisdiction is invoked by the United States in a suit against a State on a matter of high national interest.

Moreover, the considerations mentioned by the State of Texas present no basis for an assumption that the interests of convenience, efficiency and justice would be better served by remitting this proceeding to a district court. True, the State suggests that it desires to introduce "a great amount of testimony and written documents." But it is highly doubtful whether there is any relevant evidence relating to the matters outlined by Texas which may properly be introduced. The evidence which Texas wishes to introduce seems to be comparable to the elaborate materials which the State of California sought unsuccessfully to present in the form of evidence in connection with its 800-odd page answer in *United States* v. *California;* and there is no reason to believe that the principal relevant facts here will not be susceptible of judicial notice as they were in the *California* case. In the circumstances, it would be a disservice to the administration of justice to require this case to be brought in a district court for the "consideration of a great amount of testimony," which is not called for in the determination of the basic issue raised by the complaint. And if the need for resolving any subsidiary factual issues should arise after the

basic rights in the off-shore lands have been adjudicated, such subsidiary determinations can be made in accordance with machinery comparable to that which is now being worked out in connection with the *California* case. But there is no warrant whatever for requiring the basic issue to be adjudicated in the first instance by a district court in Texas. Indeed, the possibility that such a district court might, in its discretion, permit the introduction of evidence of the type that California attempted unsuccessfully to present in the resolution of the basic issue in this Court, might result in protracted hearings and delays over a long period of years, with the consequence that the interests of convenience, efficiency and justice would be defeated. There is no reason whatever why the basic legal issue here cannot be decided by this Court in the exercise of its original jurisdiction, as was done in the *California* case.

Furthermore, there are compelling reasons why this Court should exercise its original jurisdiction in this proceeding. The controversy to be resolved involves the conflicting claims of the national government and of a State of the Union as to the extent of the rights and interests which may be exercised by the respective parties as incidents of their sovereignty. The issue is therefore one of first importance in the field of federal-state relations. It is not a dispute of

minor significance which, under the revision of Title 28 of the United States Code (secs. 1251 (b) and 1345) approved June 25, 1948, Pub. Law 773, 80th Cong., 2d Sess., should be heard as an original matter by the district courts without the necessity of burdening this Court.

The basic issue in this controversy is whether the rule announced by this Court in *United States* v. *California,* 332 U. S. 19, is applicable to the lands underlying the Gulf of Mexico adjacent to Texas. The question is essentially one of law and one which, it is believed, can be determined by this Court without the taking of testimony. As we have heretofore indicated (Statement in Support of Motion, p. 4), officials of the State of Texas have refused to recognize the rights of the United States in the lands in question and are continuing the conduct of certain activities in violation of those rights. It is apparent, therefore, that only a decision of this Court on the basic issue will resolve the conflict between the parties. The matter should therefore be considered under the procedure which will permit the rendering of such a decision at the earliest possible time. In the circumstances, the exercise by this Court of its original jurisdiction would seem clearly to provide the procedure which, from the standpoint of expedition, convenience, efficiency and justice, is more satisfactory than any available in any other court. It is unthinkable

that the original jurisdiction of this Court, deliberately provided for by Congress in cases of this character, should be withheld in a controversy of such importance.

The motion for leave to file the complaint should be granted.

Respectfully submitted.

TOM C. CLARK,
*Attorney General.*
PHILIP B. PERLMAN,
*Solicitor General.*
A. DEVITT VANECH,
*Assistant Attorney General.*
ARNOLD RAUM,
*Special Assistant to the Attorney General.*
ROBERT E. MULRONEY,
ROBERT M. VAUGHAN,
*Attorneys.*

MARCH 1949.

U. S. GOVERNMENT PRINTING OFFICE: 1949

# In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 13, Original

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF TEXAS

## MOTION FOR JUDGMENT

Comes now the United States, by its Attorney General and its Solicitor General, and moves the Court for judgment as prayed in the Complaint. The United States suggests that the case be set for argument at an early date on the issues raised by the Complaint.

J. HOWARD MCGRATH,
*Attorney General.*

PHILIP B. PERLMAN,
*Solicitor General.*

SEPTEMBER 1949.



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## STATEMENT WITH RESPECT TO MOTION

On December 21, 1948, the United States filed motions for leave to file complaints in this case and in *United States* v. *Louisiana*, No. 12, Original, this Term. Ordinarily, such leave would be granted as of course, as was done in *United States* v. *California*, 326 U. S. 688. Texas and Louisiana, however, asked for permission to oppose the motions, and this Court, by order of January 3, 1949 (335 U. S. 901), allowed the States two weeks within which to present their objections. Thereafter, on January 17, 1949, Texas filed objections based upon the alleged lack of authority of the Attorney General of the United States to bring this suit, and upon the ground that the interests of convenience, efficiency and justice would be better served if the United States were required to bring suit in a federal district court instead of in this Court. On May 4, 1949, it filed a Supplemental Statement and Brief, in which it discussed these two objections further. At the oral arguments on May 9, 1949, on the objections filed by Louisiana and Texas, the Attorney General of Texas made it clear that although Texas had not separately developed the jurisdictional objection which Louisiana pressed, it nevertheless stood on that objection as well, for whatever it was worth.

On May 16, 1949, this Court entered a single order for both cases. It rejected the objections presented by both States, by granting the motions of the United States for leave to file and ordering that process issue, returnable September 1, 1949. 337 U. S. 902. Louisiana thereafter filed a petition for rehearing, continuing to insist that the Court was without jurisdiction. In denying that petition, this Court ordered Louisiana to "answer the allegations of the complaint" within the time specified, and added that "otherwise the plaintiff may proceed *ex parte*." 337 U. S. 928.

Surely, Texas was aware of the Court's order in the companion case. Yet, instead of filing an answer to the Complaint on the return date, it has filed two documents which appear to be merely dilatory maneuvers.

The first document is a motion to dismiss on the ground that the Court is without jurisdiction. This is the very point that Louisiana repeatedly pressed, that Texas had adopted for its own benefit, and that was adversely disposed of by a single order covering both cases. 337 U. S. 902. This is the very point that Louisiana sought to raise again in its petition for rehearing, which induced this Court to order that the plaintiff might proceed *ex parte*, if Louisiana did not answer the allegations of the Complaint. Plainly, Texas is on notice of these facts. And although it may not be technically in default, since the order of June 13, 1949, was entered only in the *Loui-*

*siana* case, there can be no serious question that this motion has been filed for purposes of delay.

The other document filed by the State asks for a more definite statement or a bill of particulars. This point is equally insubstantial and frivolous. Its only purpose appears to be to achieve further delay, since none of the matters called for by the State is essential to the adjudication of the basic issues in this case on the merits. The Complaint filed in this case is sufficient to apprise Texas of the nature and extent of the rights asserted by the United States. It is patterned closely after the Complaint filed in *United States* v. *California*, 332 U. S. 19. In the *California* case itself many of the same objections to the language of the Complaint and the alleged generality thereof were raised by the State (Answer of California, par. II), but these considerations did not prevent the adjudication of the controversy. Indeed, the Court specifically declared in its opinion (332 U. S. 19, 26): "California's contention concerning the indefiniteness of the claim presents no insuperable obstacle to the exercise of the highly important jurisdiction conferred on us by Article III of the Constitution."

In addition, the second document filed by the State contains a request for an extension of time within which to answer. We submit that such delaying tactics should not prevail. The Court has given the United States the right to proceed *ex parte* in the *Louisiana* case. It is plain that

Texas has done precisely what was found so objectionable in the *Louisiana* case. While Texas may not be technically in default, we think there can be no doubt that it has in substance again endeavored to prevent or unduly postpone an adjudication on the merits. In these circumstances, we respectfully suggest that the case be set down for argument on the merits of the issues raised by Complaint.

Respectfully submitted.

J. HOWARD MCGRATH,
*Attorney General.*

PHILIP B. PERLMAN,
*Solicitor General.*

SEPTEMBER 1949.

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No. 8, Original

In the Supreme Court of the United States

OCTOBER TERM, 1966

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF [illegible]

MOTION FOR [illegible]

# In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 13, Original

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF TEXAS

## MOTION FOR JUDGMENT

Comes now the United States of America, by its Attorney General and its Solicitor General, and, reserving the right to trial on any issues of fact which can not be resolved by judicial notice, moves the Court for judgment as prayed in the Complaint, for the reason that the purported defenses set forth in the answer filed herein by the State of Texas are insufficient in law.

J. HOWARD MCGRATH,
*Attorney General.*

PHILIP B. PERLMAN,
*Solicitor General.*

NOVEMBER 1949.



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## STATEMENT WITH RESPECT TO MOTION.

The State of Texas, in its Answer to the Complaint herein, has denied that this Court has jurisdiction of this cause under Article III of the Constitution; has denied the claim of ownership and paramount rights asserted by the United States over the area in controversy; has admitted that Texas claims rights in the area and that its claims are adverse to those asserted on behalf of the United States; has admitted that the State has, by general law, authorized the leasing of the lands in question for the development of petroleum deposits, that leases for such development have been executed by the State, and that the lessees thereunder have entered upon the lands and have drilled wells, some of which have been producing petroleum substances which the lessees have removed, paying to the State royalties thereon; has admitted that the State has not paid to the United States either the value of or any royalties on the petroleum substances so removed and has denied that the United Staes is entitled to such payment; has admitted that Texas claims full and complete ownership of the lands underlying the area in controversy and that the State will continue to claim such ownership, but has denied that the acts of the State or any of its lessees constitute a trespass upon said lands or a violation of any rights of the United States.

The Answer of the State also contains what is described as an Affirmative Defense of Prescription in which it is alleged that the Republic of Texas, from 1836 to 1845, had open, adverse, and uninterrupted possession of and exercised jurisdiction and control over the lands underlying the Gulf of Mexico within its established boundaries; that this claim was recognized and acquiesced in by the United States and other nations of the world; that under the terms of its annexation Texas' claim to such lands was preserved; that the State of Texas, as successor to the Republic, not having relinquished this claim, has continued to assert its rights thereunder for more than 100 years; and that the United States has recognized and acquiesced in this claim of the State during such period and is thereby precluded from asserting any right or interest adverse to the rights of Texas as so asserted and recognized.

In its Complaint, the United States has asserted its rights with respect to the lands, minerals and other things underlying the area in controversy and has alleged that the State and its lessees are trespassing upon the area in violation of those rights. The State has admitted the activities described in the Complaint, but has denied that such activities are in violation of the rights of the United States. These admissions by the State establish the requisite factual frame-

work for a determination by the Court of the basic legal issues here involved and, like the similar case of the *United States* v. *California*, 332 U. S. 19, the case is now ripe for such a determination on the merits.

The State has also filed a motion for the appointment of a Special Master to conduct pretrial proceedings, take evidence and make findings of fact and conclusions of law in the event that the Court itself is not to perform those functions. In our opinion, no such procedure is required at this stage of the litigation. As above indicated, the allegations and admissions made in the pleadings have framed the basic issues and these issues may be adjudicated by the Court without the taking of evidence.

To be sure, Texas may have certain special defenses growing out of the circumstances of its admission to the Union, although we think that such special defenses are wholly without merit. Such defenses can and should be presented to the Court by means of materials subject to judicial notice.

The basic question in this litigation is whether the rule announced in the *California* case applies to the lands underlying the Gulf of Mexico adjacent to Texas. The validity of the State's claim that the *California* decision does not apply, because of Texas' asserted distinctive status, presents only a question of law which may be heard

and determined by the Court on the basis of legislative materials and other matters subject to judicial notice. Although some of the issues in this case may take somewhat different form from those in the *California* case, the general character of the issues is similar and they may be resolved here on the basis of briefs and oral arguments, as was done in the California case.

In view of the foregoing, the motion of the State for the appointment of a Special Master should be denied and the case should be heard at the earliest convenient time on the Motion for Judgment hereto annexed.

Respectfully submitted.

J. HOWARD MCGRATH,
*Attorney General.*
PHILIP B. PERLMAN,
*Solicitor General.*

November 1949.

U. S. GOVERNMENT PRINTING OFFICE 1949

# In the Supreme Court of the United States

October Term, 1949

No. 13, Original

United States of America, plaintiff

*v.*

State of Texas

## MEMORANDUM IN OPPOSITION TO MOTION FOR ORDER TO TAKE ORAL DEPOSITIONS

The State of Texas has presented to the Court a motion for an order granting leave to take the oral depositions of five persons. It is proposed that the testimony of one of these persons be taken at Hunt, Texas, on December 2, 1949, and that of the remaining four at Beaumont, Texas, on December 5, 1949. It is stated that the age and physical condition of some of these witnesses make it necessary that their depositions be taken immediately in order that their testimony may be preserved.

The United States is strongly opposed to the granting of this motion. The motion appears to be subsidiary to the main effort which Texas is making to have a master appointed for the purpose of taking testimony in connection with the

resolution of the basic issues in this litigation. The United States is simultaneously filing a Motion for Judgment and is asking that the case be set for argument. If the Court agrees that the case should be argued on the pleadings, as was done in *United States* v. *California*, 332 U. S. 19, there is no basis whatever for the depositions sought to be taken.

The motion for these depositions seems to be nothing more than an indirect attempt to maneuver the Court into taking action looking forward to a trial of the basic issues, with extended and unnecessary hearings, that can serve only purposes of delay. In the absence of any showing that the proposed depositions are anything more than ancillary to the trial which Texas seeks before a master on the basic issues, the motion of the State should be denied. The case itself should be heard on the Motion for Judgment which is being filed by the United States, and we respectfully refer the Court to the statement which accompanies that Motion for a fuller explanation of our position that the basic issues in this case should be decided on the pleadings.

Respectfully submitted,

J. HOWARD MCGRATH,
*Attorney General.*

PHILIP B. PERLMAN,
*Solicitor General.*

NOVEMBER 1949.

U. S. GOVERNMENT PRINTING OFFICE 1949

# In the Supreme Court of the United States

OCTOBER TERM, 1949

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NO. 13, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF TEXAS

---

**MEMORANDUM IN REGARD TO MOTION OF THE STATE OF TEXAS FOR LEAVE TO FILE AN AMENDED ANSWER**

The State of Texas has filed a motion requesting leave of the Court to file a "First Amended Answer."

Although it is felt that the proposed amended answer does not add anything of substance, the United States does not oppose the granting of the motion, with the express understanding that the amended answer, when filed, is to be subject to the Motion for Judgment filed by the United States on November 29, 1949, and that the filing of the amended answer is not to delay the hearing of this cause.

Respectfully submitted.

J. HOWARD MCGRATH,
*Attorney General.*

PHILIP B. PERLMAN,
*Solicitor General.*

JANUARY, 1950

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No. 18, Original

In the Supreme Court of the United States

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# In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 13, Original

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF TEXAS

## BRIEF FOR THE UNITED STATES IN SUPPORT OF MOTION FOR JUDGMENT

### JURISDICTION

The jurisdiction of this Court rests upon Article III, sec. 2, cl. 2, of the Constitution.

### QUESTION PRESENTED

Whether, as against the State of Texas, the United States has paramount rights in, dominion over, and ownership of the lands, minerals, and other things underlying that portion of the Gulf of Mexico which is seaward of the ordinary low-water mark along the coast of Texas and outside of the inland waters of the State.

## STATEMENT

This suit was instituted for the purpose of establishing the rights of the United States, as against the State of Texas, in the bed of that portion of the Gulf of Mexico adjacent to the coast of the State of Texas which lies outside the inland waters of the State and which extends seaward from the low-water mark on the open coast.[1] The United States filed its motion for leave to file the complaint on December 21, 1948.

Texas opposed the Government's motion for leave to file its complaint, on the grounds that the Attorney General was not authorized to bring the suit and that the suit should be brought, if at all, in a district court. The State also sought to preserve, without argument, the objection that it could not be sued without its own consent. The State's objections, set forth in opposition to the motion for leave to file, were argued orally on May 9, 1949, and thereafter, on May 16, this Court overruled the State's objections and granted leave to file the complaint. 337 U. S. 902. It was ordered that process issue, returnable September

[1] No claim is here made to any lands under inland waters or to so-called tidelands, *i. e.*, those lands lying between the ordinary high- and low-water marks. The joint resolution under which Texas was admitted to the Union required the State to cede all its ports and harbors to the United States. 5 Stat. 797 (App. *infra*, p. 82). Possible rights of the United States under that provision are not within the scope of the present suit.

1, 1949. Instead of filing an answer to the complaint on the return date, Texas filed (i) a motion to dismiss on the ground that the Court is without jurisdiction; and (ii) a motion for a more definite statement or a bill of particulars. The United States thereupon moved for judgment as prayed in the complaint, and suggested that the case be set for argument at an early date on the issues raised by the complaint. On October 10, 1949, the Court denied both sets of motions, and the State was allowed thirty days from October 10 within which to file an answer to the complaint. The answer was filed on November 8, 1949. On November 29, 1949, the United States moved for judgment, and on December 5, 1949, the Court ordered the case set down for argument on that motion. Supreme Court Journal, 1949 Term, p. 85. After the case had been ordered set down for argument, Texas moved for leave to file an amended answer. The United States filed a memorandum not opposing that motion, with the express understanding, however, that the amended answer, when filed, was to be subject to the motion for judgment theretofore filed by the United States. On January 16, 1950, the Court allowed the filing of the amended answer, and reassigned the case for argument. Supreme Court Journal, 1949 Term, pp. 120–121.

1. It is alleged in the complaint that the United States owns in fee simple or possesses paramount rights in and full dominion and power over

these submerged lands; that Texas claims some right, title or interest in these lands, and has by statute (Act of July 23, 1919, General Laws, 2d Called Session, 1919, page 51, as amended) undertaken to provide for the leasing of these lands for the exploitation of petroleum and other deposits; that under that law the State has executed leases to various persons and corporations; that such lessees have drilled wells upon the land, producing and converting to their own uses quantities of petroleum, gas and other hydrocarbon substances for which they have paid to the State substantial sums of money (pp. 6–7). The Government asks for a decree declaring the rights of the United States as against the State of Texas in the area in question, and enjoining the State and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States, and requiring the State to account to the United States for money derived by it from the area subsequent to June 23, 1947 (p. 9).[2]

In its amended answer, Texas denies that this Court has jurisdiction of this cause under Article III of the Constitution; denies the claim of ownership, proprietary, and paramount rights asserted by the United States over the area in controversy;

---

[2] June 23, 1947, is the date of this Court's decision in *United States* v. *California*, 332 U. S. 19, declaring the paramount rights of the United States in lands underlying the open sea below low-water mark.

admits that Texas claims rights in the area and that its claims are adverse to those asserted on behalf of the United States; admits that the State has, by general law, authorized the leasing of the lands in question for the development of petroleum deposits, that leases for such development have been executed by the State, and that the lessees thereunder have entered upon the lands and have drilled wells, some of which have been producing petroleum substances which the lessees have removed, paying to the State royalties thereon; admits that the State has not paid to the United States either the value of or any royalties on the petroleum substances so removed and denies that the United States is entitled to such payment; admits that Texas claims full and complete ownership of the lands underlying the area in controversy and that the State will continue to claim such ownership, but denies that the acts of the State or any of its lessees constitute a trespass upon said lands or a violation of any rights of the United States.

The amended answer also contains three "Affirmative Defenses." The First Affirmative Defense alleges that the Republic of Texas, from 1836 to 1845, had open, adverse, and uninterrupted possession of and exercised jurisdiction and control over the lands underlying the Gulf of Mexico within its established boundaries; that this claim was recognized and acquiesced in by

the United States and other nations of the world; that under the terms of its annexation Texas' claim to such lands was preserved; that the State of Texas, as successor to the Republic, not having relinquished this claim, has continued to assert its rights thereunder for more than 100 years; and that the United States has recognized and acquiesced in this claim of the State during such period and is thereby precluded from asserting any right or interest adverse to the rights of Texas as so asserted and recognized.

The "Second Affirmative Defense" (a) recites that Texas established its independence in 1836 and provided that its Gulf boundary should be three leagues from land, and that the Republic was recognized by the United States and three other nations with knowledge of these declared boundaries; (b) alleges the terms of the Congressional Acts of March 1, 1845, and December 29, 1845, under which Texas was admitted to the Union, and certain provisions of the Joint Resolution of the Congress of the Republic of Texas of June 23, 1845, and of the first Constitution of the State of Texas, and (c) concludes that there existed a binding agreement between the Republic of Texas and the United States that upon annexation the State would retain all rights to the lands, minerals, and resources lying beneath the portion of the Gulf within the Republic's original boundaries, and that the United States is estopped to claim any rights in derogation of the terms of this "binding agreement between two equal sovereign nations."

The "Third Affirmative Defense" alleges that the boundaries established by the Republic of Texas were confirmed by the Treaty of Guadalupe Hidalgo in 1848, by the Gadsden Treaty of 1854, and by certain later agreements between the United States and Mexico; that thereby the United States acknowledged and confirmed the three league boundary of the Republic and the State, and acknowledged and confirmed the State's right to the submerged lands and resources here in question; and that the United States is therefore estopped from claiming any paramount or proprietary rights to such lands and resources.

2. The basic historical facts in the background of this controversy are as follows:—On March 2, 1836, Texas declared its independence from Mexico (1 Laws, Republic of Texas, pp. 3–7), and on March 17, 1836, the Constitution of the Republic of Texas was adopted (1 Laws, Republic of Texas, pp. 9–25). By the Act of December 19, 1836 (App. *infra*, p. 81), the first Congress of the Republic defined the gulfward boundary of Texas as being "three leagues from land."[3] By

[3] One marine league consists of three nautical or geographical miles, equal to 3.45 English statute miles. The traditional three-mile maritime belt is three marine miles or one league in width.

No question is here raised as to the *boundary* of Texas, although a very serious question exists as to whether Texas may have a boundary that is farther seaward than the 3-mile limit. See *infra*, pp. 72–75. The issue here relates to rights in the submerged lands, whether they be within or without that boundary.

the first two sections of a joint resolution approved March 1, 1845 (App. *infra*, pp. 82–84) (referred to herein as the annexation resolution), the Congress of the United States consented that "the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union." Among the other provisions of this annexation resolution were the following:

> Said State to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments * * *. Said State, when admitted into the Union, after ceding to the United States, all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said Republic of Texas, shall retain * * * all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharg-

ing said debts and liabilities, to be disposed of as said State may direct * * *.[4]

This proposal for annexation was accepted by the Republic of Texas. Joint Resolution approved June 23, 1845, Laws, Ex. Sess., 9th Cong., Republic of Texas, p. 4, App. *infra,* pp. 84–85. It was likewise approved by a special convention assembled for that purpose (Ordinance of July 4, 1845, 1 Paschal, Ann. Dig. Laws of Texas, 4th ed. (1873), p. 45, App. *infra,* p. 86), which also adopted a constitution for the State (*id.*, p. 47). These acts of acceptance were transmitted to Congress by President Polk on December 2, 1845. 1 Senate Docs., 29th Cong., 1st sess., No. 1, pp. 3–5, 85, 98, 117–137; 1 House Docs., 29th Cong., 1st sess., No. 2, pp. 3–5, 76, 86, 104–125. By Joint Resolution approved December 29, 1845 (App. *infra,* pp. 87–88) (referred to herein as the admission resolution), Congress declared that Texas had complied with the terms of the Joint Resolution of March 1, 1845, and was admitted into the Union as a state "on an equal footing with the original States in all respects whatever."

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[4] The third section of the Joint Resolution gave the President the option to negotiate with the Republic of Texas for annexation on different terms. The President did not take advantage of that option, but submitted to the Republic the specific terms contained in the first two sections of the Joint Resolution. 1 Senate Docs., 29th Cong., 1st sess., No. 1, pp. 32, 35, 48–49, 54, 85, 98; 1 House Docs., 29th Cong., 1st sess., No. 2, pp. 125–126, 127–128, 34–35, 41–42, 76, 86.

By joint resolution approved April 29, 1846 (App. *infra*, pp. 88–89), the legislature of the State of Texas declared that "the exclusive right to the jurisdiction over the soil included in the limits of the late Republic of Texas * * * is now vested in and belongs to the State, excepting such jurisdiction as is vested in the United States, by the constitution of the United States, and by the joint resolution of annexation * * *."

By an act approved July 23, 1919 (App. *infra*, pp. 89–90), Texas provided that the portion of the Gulf of Mexico within the jurisdiction of Texas should be subject to lease by the Commissioner of the General Land Office to any person, firm or corporation for the production of oil and natural gas.

By Act of May 16, 1941 (App. *infra*, pp. 91–95), reciting that the gulfward boundary of the State had theretofore been three leagues seaward of low-water line, Texas undertook to remove that boundary outward to a line twenty-seven miles seaward of the low-water line, and declared that the waters and bed of the Gulf of Mexico included therein were under the sovereignty of the State, subject only to the Federal Government's admiralty jurisdiction and control over commerce, and were owned by the State, and that the bed of the Gulf was set apart for the Permanent Public Free School Fund. That statute was

amended by the Act of May 23, 1947 (App. *infra*, pp. 96–97), one month before the decision by this Court in the *California* case, to remove the gulfward boundary to the outer edge of the continental shelf.

## SUMMARY OF ARGUMENT

### I

The principles of *United States* v. *California*, 332 U. S. 19, govern this case. There, the Court held that, because of the marginal sea's close relationship to the federal functions of national defense and the conduct of foreign affairs, the United States has paramount rights in, and power over, the part of the marginal sea lying within a State's declared boundaries, including full dominion over the resources of the underlying soil. This general holding, and the principles on which it rests, apply, in terms, to the cases of the original thirteen and all the remaining States—unless a particular State can show special reason for different treatment. Here, therefore, the starting point must be the postulate that the United States is *prima facie* entitled to judgment, and Texas' defense stands or falls with the merits of its claim to an exceptional status.

### II

Texas' alleged special reasons for different treatment of the marginal sea off its coast do not validly differentiate its case.

A. 1. Its principal reliance is presumably upon the reservation to the State, in its terms of admission, of "all the vacant and unappropriated lands lying within its limits," but the lands underlying the marginal sea do not fall into this class. The purpose of the reservation—explicitly stated in the annexation resolution and borne out by the negotiations with the Republic—was to enable the new State to pay the Republic's debt, which it was to assume, by selling the land. Lands under the sea were clearly not valuable or salable, in 1845 or within the then foreseeable future, or otherwise suitable for disposal for this purpose, and both this Court and the Texas Supreme Court have stressed the need for reading comparable grants and reservations in the light of the parties' purpose. *Pollard's Lessee* v. *Hagan*, 3 How. 212, 224; *City of Galveston* v. *Menard*, 23 Tex. 349, 394, 396–404. Moreover, the phrase "vacant and unappropriated lands" was regarded as the equivalent of the more usual term "public lands," and this Court and the Texas courts have long held that the latter term normally does not include tidelands or submerged lands, but only fast land subject to disposition or sale under the general land laws. And neither the Republic of Texas nor the State of Texas appears to have included the marginal sea area within Texas' public land system, until very recently.

Cognate provisions of the annexation and admission resolutions relating to national defense and foreign affairs, and the new division of powers and responsibilities between the State of Texas and the United States, also show that the maritime belt was not retained by the State as "vacant and unappropriated lands." On admission, all defense and foreign affairs functions passed from the Republic to the United States, and, by the specific terms of the annexation resolution, "all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said Republic of Texas" were thereafter to belong to the Federal Government. In particular, "ports and harbors"—contiguous to, and merging with, the marginal sea—were to pass to the United States because of their importance to the national security. Since, as the Court held in *California*, the marginal sea is inextricably tied to the defense and foreign affairs functions of external sovereignty, and the State's admission terms were thus drawn so as carefully to preserve these responsibilities and the means of fulfilling them to the United States, it is highly unlikely that the simple reservation of "vacant and unappropriated lands" was designed to cover the significant area now in dispute. Similarly, the "boundary" clause, expressly reserving to the Federal Government all interna-

tional boundary questions, weighs against Texas' construction of the "lands" clause.

2. In addition, the State's reliance on this clause is unavailing because the Republic of Texas—from which the State must trace the title to all lands it seeks to "retain"—did not have valid ownership of, or even possess rightful jurisdiction over, the offshore lands; and legally acceptable claims alone can be recognized in this proceeding, for the annexation and admission resolutions cover only "territory properly included within, and rightfully belonging to the Republic of Texas." In 1845, the conception of a maritime belt was very immature, and it did not achieve general recognition and formulation until later in the 19th century. This was true of the notion of the marginal sea as part of a nation's territorial jurisdiction and subject to its control, and it was, of course, even more plainly the case with the idea that the nation *owned* the bed under the sea. At most, the Republic had a potential, but dormant, claim to paramount control and ownership, which a government with national sovereignty might conceivably assert in the future; and with the assumption by the United States of national external sovereignty over Texas that potential claim passed to the Federal Government, to be asserted and vindicated only by, and on behalf of, the United States. In fact, the Republic does not appear ever to have claimed ownership of these lands,

and, further, the indications are that even the claim which it made to territorial jurisdiction over a three-league belt pertained only to its national external sovereignty and international relations, and not to its internal or domestic jurisdiction. Moreover, it is very doubtful that this claim to a three-league belt can be called "rightful" or "proper," so far as the United States is concerned, in view of the conflicting treaties of 1819 and 1828 with Spain and Mexico—agreements made by this country which were recognized by the Republic of Texas as binding, in 1838—which appear to have established Texas' boundary on the shore of the Gulf of Mexico.

B. Aside from the "vacant and unappropriated lands" clause (which we believe to be irrelevant for the foregoing reasons), the State does not rely, to our knowledge, on any provision in its admission terms, but it does seem to seek independent support for its position from its existence as a separate nation before entering the Union. However, under the Federal Constitution, and the terms of Texas' admission, which are admittedly controlling, this fact is immaterial to the present controversy—whatever view one takes as to the relation of the Republic to the marginal sea:—

(1) If the Republic did not have proprietary rights in, and rightful control over, the belt, as we urge above, there is not the slightest basis

for asserting ownership in the State as its "successor".

(2) Even conceding that the Republic did properly have some *control* (but not ownership) over the area, the State cannot justify a claim of present *ownership*. First, the Republic's interest in the marginal sea did not pertain to its internal and domestic sovereignty, to which the State can be said to have succeeded, but only to its national external sovereignty which has passed to the United States. Second, a claim of ownership (on the part of the State) simply does not follow from one of mere control (on the part of the Republic); there is an unbridgeable gap.

(3) But if the Republic did have full ownership and control over the belt, then Texas gave up any such rights to the United States on admission. Full paramountcy and dominion over this portion of the sea appertain to national sovereignty, as the *California* case has established, and the new sovereign therefore succeeded to these rights, if they existed in mature form at that time, or to any potential claim which might later ripen into full ownership or dominion or whatever is the most accurate description of the right to take and enjoy the complete benefit of the mineral and other resources of the bed of the sea. The "equal footing" clause of the admission resolution confirms this conclusion. It operated not only to raise the new State to the level of the previously admitted States

but also to cut down special privileges, powers, or rights emanating from its prior unique status as an independent nation. Since the other States did not, and do not, have ownership of the marginal belt, or the underlying soil; Texas must have relinquished all such rights in order to be "on an equal footing with the original States in all respects whatever."

C. Nor is the maintenance of this suit barred by any alleged adverse possession or so-called rights based upon prescription. Apart from the absence of any assertion of rights in the *submerged lands* over a long period of years by Texas, this defense is completely answered by *United States* v. *California,* 332 U. S. 19, 39–40. Moreover, it has long been established that prescription and adverse possession do not run against the United States.

## III

Texas recently has sought to extend its boundary, and its title to the submerged lands, far beyond the three-mile or three-league limit. But it is clear that regardless of the validity of the attempted extension of the State's *boundary,* the United States has, as against the State, at least the same paramount rights in, and dominion over, the lands underlying the Gulf of Mexico outside the marginal sea, as it has with respect to the marginal sea (which is itself within the State's *boundaries*). *United States* v. *California*

recognizes the patent fact that the ocean outside of the marginal belt is of national concern, and obviously that portion of the ocean is even less closely related to the interests of the coastal State and more directly related to the national defense, the conduct of foreign affairs, and the carrying on of international commerce. This is so even if the State properly can include a large part of the ocean within its territorial limits. For this reason, it is unnecessary, in this suit, to determine the validity of the Texas boundary-extension statutes, but we may point out, in passing, that it would seem to be solely within the province of the Federal Government to establish external territorial limits.

Finally, it should be noted that the United States has affirmative interests and rights in the ocean in and beyond the marginal sea, not only as against the State, but in its capacity as a member of the family of nations. Presidential Proclamation No. 2667 (September 28, 1945) declares the resources of the continental shelf as within this country's jurisdiction and control, and there have been previous exercises of dominion and control over certain areas beyond a three-mile or nine-mile belt, and in some instances over the underlying resources. The Government of the United States is therefore justified in claiming rights, which it seeks to vindicate in this Court, in the sea and underlying land up to the "outer edge of the continental shelf"—at least as against the State of Texas.

## ARGUMENT

### I

### THE PRINCIPLES OF UNITED STATES *v.* CALIFORNIA GOVERN THIS CASE

This case presents basically the same issue decided by the Court in *United States* v. *California*, 332 U. S. 19, and the principles of that decision dispose of the present suit. There, California asserted ownership of submerged lands and their resources lying between the low-water mark on its coast and a boundary claimed by the State as three English miles from shore. Here, as there, "the point of difference is as to who owns, or has paramount rights in and power over * * * land under the ocean off the coast," and "involves the conflicting claims * * * as to which government, state or federal, has a superior right to take or authorize the taking of the vast quantities of oil and gas underneath that land" (332 U. S. at pp. 24–25). In resolving the California dispute, the Court held that (a) the thirteen original colonies did not acquire ownership of the marginal sea, or the underlying soil, and the "equal footing" clause of her admission statute gave California no greater rights (332 U. S. at 30–33, 38–39) (see also *Toomer* v. *Witsell*, 334 U. S. 385, 402); (b) the United States has asserted and has acquired national dominion and control over the marginal sea (332 U. S. at 33–34); (c) protection of the three-mile belt has

been and is a function of national external sovereignty, because of the belt's close relationship to national defense and the conduct of foreign affairs, which are federal powers and responsibilities (332 U. S. at 34–36); and (d) for these reasons, a State may exercise local police power functions in the part of the marginal sea properly within its declared boundaries, but the United States has paramount rights in and power over the area, including full dominion over the resources of the underlying soil (332 U. S., at 36–37, 38–39).

These principles are universal in their formulation and application, not limited to the test suit against California and its individual facts, and they control the cases of the original thirteen and all the remaining States—unless a particular State can show special reason for different treatment. Texas and California came into the Union at about the same time (1845 and 1850); both entered "on an equal footing with the original States in all respects whatever" (9 Stat. 108, *infra*, p. 88; 9 Stat. 452); and simultaneously with their admission both claimed the marginal sea within their boundaries. At the very least, therefore, the starting point of this suit must be the *prima facie* postulate that the case is governed by the *California* decision, and the United States is entitled to judgment.[5]

[5] In the litigation involving the marginal sea off its coast, California claimed a seaward boundary of only three English miles from its shore line, and therefore asserted ownership of lands lying wholly within the marginal sea as recog-

## II

### TEXAS' ALLEGED SPECIAL REASONS FOR DIFFERENT TREATMENT OF THE MARGINAL SEA OFF ITS COAST DO NOT VALIDLY DIFFERENTIATE ITS CASE

Texas' assertion of title to the lands under the marginal sea off its coast appears to rest on a claim to be on a better footing than California by reason of the particular terms of the joint resolutions under which the State of Texas was admitted to the Union, and also, as an independent ground, by reason of asserted former ownership of the lands by the Republic of Texas.[6] Neither basis can sustain the State's claim to a superior position.[7]

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nized in international law and by the United States. At the present time, Texas claims a boundary at the outer edge of the continental shelf. *Supra*, pp. 10–11; *infra*, pp. 91–97. The Republic of Texas claimed a marginal sea of three leagues, that is, nine marine miles. In general, the United States claims, as against foreign countries, a marginal sea three miles in width.

The Government takes the position that the decision in the *California* case is controlling not only as to the marginal sea but as to the area beyond. See Point III, *infra*, pp. 68–80. Since it is the Government's view that, as against Texas, its rights outside the marginal sea are at least as great as within it, it is unnecessary to determine whether the marginal sea off Texas is three or nine marine miles, or greater.

[6] These contentions are made in the body of the State's amended answer, and in its Second and Third Affirmative Defenses.

[7] Texas also makes various contentions based upon alleged adverse possession, prescription, and other related defenses. See Amended Answer, pp. 9–11, 16–17. However, similar contentions raised by California (see Answer of California, pp. 13 *et seq.*) were rejected by the Court. See also *infra*, pp. 63–65.

A. *The reservation to the State, in its terms of admission, of "all the vacant and unappropriated lands lying within its limits" does not support its claim of present title to the marginal sea.*

The Joint Resolution of March 1, 1845 (*infra*, pp. 82–84)—"for annexing Texas to the United States"—provided, as one of the conditions of Congressional consent to the admission of Texas, that the State was to "retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct * * *." These seem to be the only provisions that give color to the State's contention that it has superior rights in the marginal sea. Apparently characterizing the land beneath the marginal sea as such "vacant and unappropriated lands lying within its limits," Texas now urges that these terms of admission irrevocably confirmed its title to the areas now in dispute. This contention is unacceptable for several reasons.

1. *The marginal sea is not within the class of "vacant and unappropriated lands."* Regardless of any rights the Republic of Texas may have had with respect to the marginal belt,[8] the ex-

[8] We discuss below, at pp. 44–52, the claims that the Republic of Texas had jurisdiction over, and ownership of, the lands underlying the marginal belt.

clusion of this area from the category of *State*-retained "vacant and unappropriated lands lying within its limits" is affirmatively required by (a) the clause's purpose, the circumstances of its inclusion, and the generally accepted meaning of the phrase both in Texas and in federal usage, as well as by (b) the cognate provisions of the annexation and admission resolutions and the incidents of the newly-established relationship between Texas and the United States.

a. *Purpose of the reservation:* The purpose stated in the annexation resolution for the new State's retention of the "vacant and unappropriated lands" was that these lands were "to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct." *Infra,* p. 83.[9] The lands contemplated were obviously those which were suitable for sale and disposal for sums which would reduce the Republic's debt—in other words, lands entirely comparable to the "public lands," as then understood both in the United States and in Texas, which were frequently used for a similar purpose.

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[9] The joint resolution also expressly provided that the new State was to "retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said republic * * * but in no event are said debts and liabilities to become a charge upon the Government of the United States * * *." *Infra,* pp. 82–83.

This is fully borne out by the diplomatic exchanges between the United States and the Republic at the time annexation was under serious consideration. Thus, on March 10, 1845, Secretary of State Buchanan, writing to Mr. Donelson, the American chargé d'affaires in Texas, suggested that, separately from acceptance by Texas of the terms of the joint resolution of March 1, 1845, arrangements should be worked out for Texas to cede her public lands to the United States in return for assumption of the Texan debt (1 Sen. Docs., 29th Cong., 1st sess., No. 1, p. 37; 1 H. Docs., 29th Cong., 1st sess., No. 2, p. 129):

> The *public lands* of Texas ought unquestionably to belong to the United States. This is equally due to the prosperity of Texas and to that of the other States within whose limits there are public lands. Our land system has worked admirably in practice, and has met the approbation of the world. Equal and exact justice to all the States requires that *all the public lands* should be subject to the control of the federal government, and that they should be administered under a uniform system. Besides, the peace of the whole country, as well as the security of Texas, demands that this government alone should possess the power of extinguishing the Indian title within her limits, and have the absolute and exclusive control over the Camanches and other fierce and warlike tribes which

> now roam over her territory. The United States must incur the expense and bear the burden of wars with these tribes, and they ought, therefore, to possess the power of preserving peace, and regulating all our relations with them. In short, it is indispensable that our Indian policy should be extended over Texas. [Italics supplied.]

On March 31, 1845, Mr. Donelson, in transmitting the annexation proposal to Mr. Allen, the Attorney General of Texas, then conducting its foreign affairs, referred to possible defects in the terms of Congress' proposal, saying in part (1 Sen. Docs., 29th Cong., 1st sess., No. 1, pp. 50–51; 1 H. Docs., 29th Cong., 1st sess., No. 2, p. 36):

> So, also, on the part of the United States it was objected that the cession of the unappropriated lands ought to have been made by Texas for a fair consideration, to enable the federal government to extend their Indian policy over the various tribes within her limits. The right to extinguish *the Indian title to these lands* seems almost a necessary consequence of the obligation to regulate the trade and intercourse with them, and to keep them at peace with each other and with us; and the absence of any provision to this effect in the terms proposed, constituted a serious obstacle in the minds of many sincerely friendly to the measure. Yet, so strong was the desire to put the question beyond the possibility

> of defeat, and to leave with Texas the means of discharging her national debt, that they nevertheless recorded their votes in its favor. [Italics supplied.]

Writing further to Mr. Allen on June 13, 1845, Mr. Donelson advanced Secretary Buchanan's suggestion (1 Sen. Docs., 29th Cong., 1st sess., No. 1, pp. 78–79; 1 H. Docs., 29th Cong., 1st sess., No. 2, pp. 67–68);

> So also in respect to *the public lands which are left by the provisions of the joint resolution without cession to the United States.* This was done because it was believed that the public debt of Texas could not be extinguished if she parted with her lands. And the assumption of that debt was impracticable, because it would have been setting a dangerous precedent, not warranted in the judgment of a large portion of Congress, by the constitution of the United States. Hence nothing could be settled differently from what it is in the resolution on this subject.
>
> Both honor and justice forbade the United States from touching the only resource, which, after admission into the Union, would be left to Texas to pay the debt contracted in the war for her independence. Although in many points of view the reasons were urgent for insisting on the operation within her limits *of the same land system* which has been introduced with so much advantage to the other States of the Union, yet they were given up

rather than endanger the passage of the bill, or leave doubtful the ability of Texas to discharge the highest and most sacred of all public obligations, the payment of the means which have been borrowed and expended to advance the cause of liberty and independence. It is, however, not the less true, if an agreement can be made for the payment of this debt by a pledge of these lands for the purpose, that the prosperity of Texas, like that of the other States of the Union, would be promoted. The *land system now in force in the United States has worked* admirably well, and has contributed greatly to the prosperity of the new States, by giving uniformity to the surveys, and that general accuracy in the establishment of metes and boundaries which are so useful in preventing litigation and protecting the rights of the hardy tillers of the soil. Even those States that surrendered the territory out of which the large addition to the republican family has been made, have found that they have been more than compensated in relief from any system they could have enforced separately for the preservation, survey, and sale of the lands. It cannot be doubted that the like causes would produce the like effects in Texas.

Under these views of this subject, and seeing that equal and exact justice to all the States of the Union would require that *all their public lands* should rest on the same footing, and be administered under the

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> same uniform system, the only question to solve is, how can this be done without leaving Texas unable to discharge her public debt, and without means to put into efficient operation her State government? [Italics supplied.]

These excerpts confirm the conclusion that the reason for leaving to Texas the "vacant and unappropriated" lands was to allow the State to dispose of them, and with the proceeds to discharge the debts of the Republic. The disadvantages of that course to the United States were said to be that it interfered with the federal public land and Indian policies. These statements of the advantages to Texas and the disadvantages to the Federal Government, as well as the frequent explicit references to "public lands", show that the parties plainly had in mind salable "public lands," of the type then normally administered by the Federal Government. In 1845, however, lands under the sea were clearly not regarded as valuable or salable, or as suitable for disposal to secure monies for reduction of the public debt. Cf. *United States* v. *California*, 332 U. S. 19, 38, 39.[10]

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[10] "As a matter of fact, the record plainly demonstrates that until the California oil issue began to be pressed in the [nineteen] thirties, neither the states nor the Government had reason to focus attention on the question of which of them owned or had paramount rights in or powers over the three-mile belt." (332 U. S. at 39).

"The question of who owned the bed of the sea only became of great potential importance at the beginning of this century when oil was discovered there." (332 U. S. at 38).

Reserving these off-shore lands to Texas would in no wise have furthered the joint purpose of Congress and of Texas to give the new State the means for liquidating the Republic's liabilities, and there is therefore no warrant in the legislative purpose to read the phrase "vacant and unappropriated lands" as including the marginal belt.

There is, we may add, high authority for construing this phrase in the light of the parties' fundamental aim. Early in Texas' history, the State Supreme Court interpreted a grant of land on Galveston Island in Galveston Bay, for the purpose of building the city of Galveston, as covering the shore and certain tideland flats—although "viewed as an ordinary grant of land" or "by the strict letter of the legislative grant" it would not do so (*City of Galveston* v. *Menard*, 23 Tex. 349, 394, 404 (1859))—because the needs of the city-to-be required the inclusion. "This was not an ordinary sale, or donation of land * * * for indefinite purposes; but it was a specific grant, directly made by the government, for a specific object; and it must be understood and construed, with reference to such object." 23 Tex. at 397.

Even more pointed is this Court's holding in *Pollard's Lessee* v. *Hagan*, 3 How. 212, 224, that Alabama had title to lands underlying *inland* navigable waters—despite the express retention by the United States in the Alabama admission

act of all rights in "waste or unappropriated lands"—because, in part, the purpose of this reservation would not be served by including these submerged lands. In its comments on *Pollard's Lessee* in the *Menard* case, *supra*, the Texas Supreme Court put the point in words precisely applicable, in converse form, to the present dispute: "The object in retaining such waste lands, was for sale [by the Federal Government]; and as these flats were not of a character of property ordinarily sold by a government, but usually held in trust for the public, it could not be supposed that they were intended to be retained [by the United States]." 23 Tex. at 396.[11]

b. *Equivalence of "vacant and unappropriated lands" and "public lands."* In addition, as we have already suggested, the critical phrase in the annexation resolution was considered the equivalent of the more usual term "public lands," which has long been normally confined to land above ordinary high tide. This Court's decisions

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[11] The Texas court went on to say that, in *Pollard's Lessee*, "the right in the waste lands was retained [by the Federal Government], and upon a strict literal interpretation, lands covered with tide-water, such as the flats, would have been also retained. But by considering the character of the contracting parties, and the object of the party, in retaining the waste lands, and the uses and purposes to which such property, as land covered with tide-water, like the flats, is to be applied, and its immediate connexion with the common interest, of which the government is the protector; the conclusion was arrived at, that it was not intended to be retained." 23 Tex. at 396.

respecting general legislation involving the disposition of "public lands" appear to hold that the term does not include tidelands or submerged lands but only fast land, which are subject to sale or disposition under general land laws. *Newhall* v. *Sanger,* 92 U. S. 761, 763; *Mann* v. *Tacoma Land Co.,* 153 U. S. 273, 284; *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10, 17.[12]

The Texas courts, since admission to the Union, have followed the same usage in construing legislation granting rights in the state public domain, at least until the present controversy began. *City of Galveston* v. *Menard,* 23 Tex. 349, 376 (1859), as has already been noted (*supra,* pp. 29–30), considered "waste or unappropriated lands" to be only those lands ordinarily sold by a government. In *De Merit* v. *Robison,* 102 Tex. 358 (1909), the State Supreme Court refused to read a statute opening to sale "all public school,

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[12] The California admission act specified that the State would never interfere "with the primary disposal of the public lands within its limits" and would not question the "title of the United States to, and right to dispose of, the same." 9 Stat. 452. In the *California* case, the United States recognized, however, that this Court's decisions cited above made it doubtful whether the Government's claim to the California marginal sea could rest on this express provision (Brief for the United States, No. 12, Original, Oct. T. 1946, pp. 62–63), and the Court's opinion in that case does not mention the "public lands" clause or base its decision on it. Yet, if the submerged lands adjacent to California were "public lands," the entire case should have been disposed of on that ground, for the act of Congress admitting California to the Union explicitly reserved the "public lands" to the United States.

university, asylum and public lands" containing certain mineral deposits, as applying to tidelands in San Jacinto Bay. Citing *Mann* v. *Tacoma Land Co.*, 153 U. S. 273 (*supra*, p. 31), the court held that under the general law "a grant of land bordering on the coast where the tide ebbs and flows conveys title only to the line of ordinary high tide, unless there be something to indicate an intention to extend the grant beyond that line" (p. 361). The legislature, the court said, used the words "public lands" in that sense, and the claimant had no right to purchase the soil lying below the line of ordinary high tide. "In contemplation of law it was not land, but water" (p. 362).[13]

Moreover, as we point out *infra* at p. 47, the Republic of Texas apparently did not include the marginal sea area in its public land system.[14] When the annexation joint resolution provided that the State should retain its "vacant and unappropriated lands" to be sold to discharge the debts of the Republic, it is reasonable to assume that the phrase would most naturally be understood to contemplate a continuation of the same

[13] To the same effect, see *City of Galveston* v. *Mann*, 135 Tex. 319, 330 (1940); *Lorino* v. *Crawford Packing Company*, 142 Tex. 51, 56 (1943).

[14] At pp. 47–49, *infra*, we also discuss the Republic's county system, and show that its coastal counties were bounded by the shore. This strongly indicates, that, at best, the Republic's claim to the marginal sea did not pertain to its internal jurisdiction but rather to its national external sovereignty.

general program of land disposal instituted by the Republic, rather than to intend the addition, without express mention, of a wholly different type of land, the disposal of which had never theretofore been contemplated or provided for, and for which no market existed at that time.

It is equally significant, as a practical construction, by the State itself, of the phrase "vacant and unappropriated lands," that until recent years the Commissioner of the State's General Land Office has not included lands under the Gulf, in accounting for the disposition of the public domain. Thus, his 1880 report showed the total area of the State's domain as 172,604,160 acres, comprising 151,811,390 acres already granted or reserved for specified purposes, 1,722,880 acres of bays, and 19,069,890 acres subject to location. *Infra*, p. 100. His report in 1936 estimated the total area as 170,936,080 acres, comprising 165,852,244 acres already surveyed and granted or reserved for specified purposes, 1,500,000 acres unsurveyed in "coastal areas, river beds and vacancies," and excesses in surveys, less loss due to conflicts, estimated at 3,500,000 acres.[15] *Infra*, p. 101. Neither tabulation included lands below the low-water mark in the Gulf. Such lands were not within any of the enumerated grants or reservations; neither were they included

[15] These items total 170,852,244 acres. The discrepancy of 83,836 acres between that figure and the 170,936,080 acres given as the total area remains unexplained.

in lands subject to location. *City of Galveston* v. *Mann*, 135 Tex. 319, 330, *supra*, p. 32. The 1880 item for "bays" was neither adequate nor appropriate to include the marginal sea area, and obviously "coastal areas" in the smaller 1936 item for "coastal areas, river beds and vacancies" could not have embraced more than bays and tidelands. However, in his "History and Disposition of Texas Public Domain" included in the *Report of the Second Texas Surveyors' Short Course*, published by the General Land Office in 1941, the Commissioner gave 170,926,000 acres as the total area of the State to the three-mile limit,[16] and the total area to the three-league limit as 172,687,000 acres, of which 3,250,000 acres are in the submerged coastal areas. *Infra*, pp. 101–102. This appears to be his first inclusion of the Gulf lands in any itemization of the State's public domain. Thus, the State's attempt to include the Gulf lands in its public domain seems to be a relatively recent innovation, reflecting an enlargement of its original understanding of the reservation of vacant and unappropriated lands.

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[16] The significance of the three-mile limit, from the State's point of view, is not apparent. *Supra*, pp. 10–11; *infra*, pp. 47, 81, 91–97. Comparison of this 1941 tabulation with that for 1936 shows that retention of approximately the same total for the area to the three-mile limit (170,926,000 acres) as the 1936 total for inland area (170,936,080 acres) is accounted for largely by a reduction of the item for excesses in surveys from 3,500,000 to 1,000,000 acres.

c. *Significance of the transfer of defense and foreign affairs functions from Texas to the United States:* The Joint Resolution of March 1, 1845, also contained two specific provisions which indicate that the resolution's general reservation to the State of "vacant and unappropriated" lands could not have been designed to include submerged lands in the Gulf. The first is the requirement that the State cede to the United States "all public edifices, fortifications, barracks, ports and harbors, navy and navy yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said Republic of Texas * * *." *Infra*, pp. 82–83. This provision has a direct bearing, first, because it indisputably demonstrates and confirms the transfer of *all* defense and foreign relations functions to the United States, secondly, because it compels the cession of "all other property and means pertaining to the public defence belonging to said Republic of Texas," whether listed or not, and, finally, because it expressly requires "ports and harbors"—contiguous to and merging into the marginal sea—to be ceded to the Federal Government. The second pertinent clause of the annexation resolution is that which gives to the Federal Government the right to adjust "all questions of boundary that may arise with other governments." *Infra*, p. 82.

(i) No one denies that the annexation of Texas to the Union resulted in transferring the conduct

of its defense to the Federal Government, as the "defence" clause confirms. This has been recognized by Texas itself from the beginning. Mr. Donelson, writing to Secretary of State Buchanan on May 6, 1845, shortly after negotiations were begun, reported receiving from the Texas acting Secretary of State "an earnest expression of the wish of the government of Texas that, as soon as their assent is given to the terms contained in the joint resolution for their admission as a State, the troops of the United States may be marched to some suitable point on the western frontier, for the purpose of guarding the inhabitants against Mexican or Indian incursion." 1 Sen. Docs., 29th Cong., 1st sess., No. 1, p. 57; 1 H. Docs., 29th Cong., 1st sess., No. 2, p. 44. That was agreed to by President Polk (1 Sen. Docs., 29th Cong., 1st sess., No. 1, p. 41; 1 H. Docs., 29th Cong., 1st sess., No. 2, p. 133), and immediately upon approval of annexation by the Texas convention, federal troops were ordered into Texas to defend the border. 1 Sen. Docs., 29th Cong., 1st sess., No. 1, p. 97; 1 H. Docs., 29th Cong., 1st sess., No. 2, pp. 84–85. Equally obviously, the annexation resulted in transferring to the United States all conduct of foreign affairs. This also has been recognized by Texas from the outset. Thus, when Captain Elliot, the British chargé d'affaires in the Republic of Texas, sent to the Texas Secretary of State, on January 4, 1846, a reminder that Britain would expect strict per-

formance of Texas' treaty obligations, despite the annexation to the United States, the Texas Secretary of State replied that "after the organization of the State government shall have succeeded to that of the republic, the settlement of all questions growing out of her existing treaty relations with foreign powers must, so far as Texas is concerned, be necessarily referred to the government of the United States." 7 Sen. Docs., 29th Cong., 1st sess., No. 375, p. 3.

It follows that the United States, rather than Texas, must have been deemed vested, on annexation, with such claims or potential claims to the marginal sea as then existed, and the general reservation to the State of "vacant and unappropriated lands" did not cover that area. For the rights claimed by littoral nations in their marginal seas have from their inception been recognized as pertaining to their national defense. "The three-mile rule is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location." *United States* v. *California*, 332 U. S. 19, 35. It was for that reason, as well as because of the belt's importance in foreign relations generally, that this Court held in the *California* case that paramount rights in land under the marginal sea are in the Federal Government, which is charged with the conduct of those matters. *Supra*, pp. 19–20. Possession by the United States of supreme rights in the land underlying the terri-

torial waters in the Gulf of Mexico was a defense necessity, and it is most improbable that the joint resolution, all inclusive in its designation of the defense property to be handed over,[17] was intended to permit this prime tool and shield of defense, without specific mention, to pass to, or remain with, the State. On the contrary, it is reasonable to suggest that the territorial sea was ceded expressly (if owned by the Republic) as "other property and means pertaining to the public defence." Certainly, if the general phrase, "vacant and unappropriated lands" had been thought to include the marginal belt, the obvious objection, from the United States' point of view, to letting Texas retain the submerged lands, would have been that such lands were essential to the United States in its conduct of national defense and foreign relations; yet, as we have seen (*supra*, pp. 24–28), no such objection to the proposed terms of annexation was suggested by the representatives of the United States, who were concerned mainly with the extension of the Federal public land policy and with our relations with the Indian tribes. See also *infra*, pp. 56–63.

(ii) The special mention of "ports and harbors" among the defense facilities transferred to

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[17] "* * * all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said Republic of Texas * * *." *Infra*, pp. 82–83.

the United States further emphasizes the exclusion of the marginal sea from the category of retained "vacant and unappropriated lands." Ports and harbors lie side by side with, and shade into, the marginal sea involved here. Both ports and harbors and the marginal sea directly concern the national defense. It would be extremely strange, if not verging on the capricious, to apportion ports and harbors to the United States because of their close connection with defense,[18] while at the same time withholding from the United States paramount rights in the potentially more important adjoining belt further out to sea.

(iii) The "boundary" clause of the annexation resolution—"said State to be formed, subject to the adjustment by the government of all questions of boundary that may arise with other governments"—does more than merely reserve to the United States one specific matter involving foreign affairs. Against the broad background of a pos-

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[18] It is clear from the wording of the annexation resolution that the transfer of "ports and harbors" was directly connected with the assumption by the United States of defense functions. *Supra*, pp. 35, 38.

As pointed out in the Government's brief in the *California* case, pp. 67–70, 143–153, this Court has ruled that the individual States own the lands underlying their inland navigable waters, including ports and harbors, and the Government, in the interest of stability of titles does not contest those results, although it feels that such results are highly questionable. Accordingly, except for the express cession of ports and harbors by Texas, they would probably remain as the property of the State.

sible war with Mexico over the annexation of Texas, and with the special boundary issues stemming from the treaties between this country and Spain and Mexico in the foreground (*infra*, pp. 49–52), the incorporation of the "boundary" clause cautions that the balance should weigh against including areas of potential international controversy under the "vacant and unappropriated lands" clause, unless the strongest reasons exist for doing so. In 1845, as today, the marginal sea was the potential subject of a grave international dispute which might be settled by various international undertakings and commitments bearing directly on rights in, and the control and use of, that very area. Cf. *United States* v. *California*, 332 U. S 19, 34–35.[19] On the other hand, as we have shown, there are certainly no reasons compelling the "vacant" lands proviso to be read so as to cover the maritime belt.[20]

[19] Nor is this argument neutralized by the fact that Texas owns the bed of the Rio Grande River which likewise could be, and in fact was, the subject of an international boundary dispute. For, its title to the bed of that river is founded on the rule of *Martin* v. *Waddell*, 16 Pet. 367, and *Pollard's Lessee* v. *Hagan*, 3 How. 212, rather than upon the "vacant and unappropriated lands" clause, and is no more decisive of the issue of ownership of the marginal sea than was State ownership of inland waters in the *California* case.

[20] The "equal footing" clause—that Texas was "admitted into the Union on an equal footing with the original States in all respects whatever," (*infra*, p. 88) likewise supports the view that the "vacant and unappropriated" lands phrase should be interpreted as excluding the marginal belt. This argument is developed, in a somewhat different connection, below at pp. 61–63.

(iv) This line of reasoning—drawn from the implications of the "defence" and "boundary" clauses of the annexation resolution—parallels that followed by this Court in holding in *Pollard's Lessee* v. *Hagan*, 3 How. 212, that Alabama and the other states own the navigable tidewaters, and the soil under them, as an inseparable attribute of state sovereignty. This decision was rendered despite Alabama's express disclaimer, in its admission statute, of "all right and title to the waste or unappropriated lands lying within the said territory; and that the same shall be and remain at the sole and entire disposition of the United States." Act of March 2, 1819, c. 47, 3 Stat. 489, 492. Such a disclaimer was made by an ordinance appended to the constitution of the State. Ormond, Bagby and Goldthwaite, Code of Alabama (1852), 28, 47. The United States claimed to have retained, by that provision, title to land under inland navigable waters, but this Court held otherwise. It held that title to such land was an incident of municipal sovereignty, and that since the United States had no power under the Constitution to retain any municipal sovereignty within a State, it could not retain any of the incidents thereof, including land under navigable inland waters.

Texas' case is the exact converse of Alabama's. The latter gave up its "waste or unappropriated lands", but nevertheless retained possession of land underlying inland navigable waters because of the demands of municipal state sovereignty.

Texas, on the other hand, retains its "vacant and unappropriated lands," but cannot claim the marginal sea because of the demands of national external sovereignty. In *California*, 332 U. S. 19, 36, the Court pointed out that if the rationale of the *Pollard* case "is a valid basis for a conclusion that paramount rights run to the states in inland waters to the shoreward of the low water mark, the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt." [21] Under the Federal Constitution, and the terms of its admission, Texas, as a State, could not possess any elements of national, as distinguished from municipal, sovereignty. Consequently, the reservation to Texas of "vacant and unappropriated lands"

[21] In the Brief for the United States in the *California* case, it was urged (pp. 143–153) that the *Pollard* rule that the states own the land underlying inland waters rested on the unsound doctrine that ownership of submerged lands is an attribute of sovereignty, and should therefore not be extended to the marginal sea. But the Government also contended, in the alternative, that, in any event, the necessary implication of that doctrine is that the United States, rather than the states, has full dominion and control over the marginal belt, because ownership of those submerged lands, if an attribute of sovereignty, is an attribute of national rather than local sovereignty (pp. 72–91). In its opinion in *California*, the Court stated that it was "not persuaded to transplant the *Pollard* rule of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the ocean, so much more a matter of national concern" (336 U. S. at 32), and continued with the sentence quoted above in the text.

does not include land under the Gulf, just as in the *Pollard* case the reservation to the United States of "waste or unappropriated lands" did not apply to lands under navigable inland waters.[22]

In sum, Texas, which was so eager to recognize that annexation put on the Federal Government the responsibility of defense and the conduct of foreign relations (*supra*, pp. 36–37), must likewise recognize that it necessarily gave to the Federal Government all the appurtenances of that responsibility including, as this Court held in the *California* case, paramount rights in the lands underlying the marginal sea. The retention of "vacant and unappropriated" lands avails the State nothing; it was never intended to cover lands in the marginal sea. As the Supreme Court of Texas pointed out in 1859, in resolving intergovernmental land-grant disputes of this type one must consider the "character of the contracting parties," the "object of the party" seeking rights to the land, the "uses and purposes to which such property * * * is to be applied," and "its immediate connexion" with the interest "of which the government is the protector." *City*

[22] As we have already pointed out, a further ground of the holding in the *Pollard* case was that since the "waste or unappropriated" lands were to be held for sale, the clause could not be deemed to cover beds of river, bays, etc.; the analogy to the present case, based on that ground of the holding, is indicated *supra* at pp. 29–30. Below, we make a further comparison with the *Pollard* case. *Infra*, pp. 62–63.

*of Galveston* v. *Menard*, 23 Tex. 349, 396, quoted at fn. 11, *supra*, p. 30. By this test, there can be only one answer to the present controversy.

2. *In addition, the Republic of Texas did not have either rightful jurisdiction over, or ownership of, the offshore lands.* The fundamental premise of the State's argument based on the "vacant and unappropriated lands" clause is, of course, that the Republic of Texas had *proprietary* rights in the marginal sea lands. Even full territorial jurisdiction in the Republic would not be enough to support the State's contention; it must show, as the starting point of its claim of present title, that whatever claims the Republic had to these lands had ripened into full ownership. Otherwise, the State of Texas would clearly have no right to "*retain*" this area as "vacant and unappropriated lands lying within its limits." There is the gravest doubt, however, whether the Republic had, or ever asserted, any valid claim to ownership; and there is also a serious question even as to the logically antecedent issue of jurisdiction, *i. e.*, whether the Republic rightfully had any control or sovereignty over the marginal sea. Absence of a *rightful* claim to control and sovereignty, or to ownership, would be decisive here, for the joint resolutions of annexation and admission covered only the "territory properly included within, and rightfully belonging to the Republic of Texas" (*infra*, pp.

82, 87), and only such legally recognized territory could be said to fall within the class of "vacant and unappropriated lands lying within [the State's] limits." Cf. *United States* v. *Texas*, 162 U. S. 1, 39, 91.

a. As the Court pointed out in *United States* v. *California*, 332 U. S. 19, 32–33, the conception of a maritime belt was not generally accepted at the time this country won its independence from England, and only gradually won acquiescence largely as a result of the efforts of our statesmen; in fact, "as late as 1876 there was still considerable doubt in England about its scope and even its existence. See *The Queen* v. *Keyn*, 2 Ex. D. 63." And the 19th and 20th century materials collected in the Government's brief in the *California* case (Oct. T. 1946, No. 12—Original, pp. 30–58) indicate that the general international acceptance of the concept came about in the latter portion of the period, the notion of a three-mile territorial belt, both in its territorial and its property sense, being very immature, if not foetal, in 1845. Texas' treaties clearly did not affirm jurisdiction over, or property rights in, the marginal sea (*infra*, pp. 49–52), and there is nothing else from which to infer any international acceptance of a territorial belt along the Republic's coast. There is good reason, therefore, to doubt whether Texas, while independent, rightfully had any control or sovereignty over the marginal sea that was recognized by the family of nations,

let alone a valid and recognized claim to full ownership.

In any case, the unformed character of the marginal sea concept in the 1840's—to which we have just referred (p. 45)—indicates that at that stage of development it is unlikely that nations could be considered to *own* the bed under the marginal sea, even if they could properly assert some kind of territorial sovereignty over the strip. Thirty years later, in *The Queen* v. *Keyn*, L. R. 2 Exch. Div. 63, 198–199 (1876), Lord Cockburn doubted the Crown's ownership of the bed of the sea beyond low-water mark; and in 1914 Viscount Haldane asserted that a conclusion had not yet been reached "on the question whether the shore below low water mark to within three miles of the coast forms part of the territory of the Crown or is merely subject to special powers necessary for protective and police purposes." *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1914) A. C. 153, 174–175; Cf. *Secretary of State for India* v. *Chelikani Rama Rao*, L. R. 43 Ind. App. 192 (1916). It is impossible to say, we think, that the idea of state ownership of the subsoil existed in 1845 in any sense of which Texas can now take advantage.

At most, the Republic had a potential, but dormant, claim to paramount control and ownership, which a government endowed with national and external sovereignty might conceivably assert at

some future time, as against the other nations of the world. When the Republic's national sovereignty passed to the United States in 1845 (*supra*, pp. 35–37; *infra*, pp. 58–61), that potential claim—inextricably tied to national rather than State sovereignty (*supra*, pp. 37–44; *infra*, pp. 58–63)—passed to the United States, and could be asserted and vindicated only by, and on behalf of, the United States.

b. It should be noted, in this connection, that the Republic of Texas itself does not appear to have made any claim to *ownership* of the marginal sea. Although its Act of December 19, 1836 (*infra*, p. 81) defined the boundary of the Republic as running "along the Gulf of Mexico three leagues from land," Texas did not administer lands under the marginal sea as part of its public lands. The Act of December 14, 1837 (2 Laws, Republic of Texas, p. 62) organized the General Land Office on a county basis and, as pointed out below (pp. 48–49), the coastal counties stopped at the shore of the Gulf. Lands in the marginal sea were not included.

On the other hand, all the indications are that the Republic, far from asserting proprietary rights in its maritime belt, recognized that its claim to the area did not pertain even to its internal or domestic jurisdiction, but at most affected, in a rather nebulous way, only its national external sovereignty and its international relations. The Republic's constitution required that

"the republic shall be divided into convenient counties" (Art. IV, sec. 11; 1 Laws, Republic of Texas, p. 14), yet coastal counties were described by acts of the Texas Congress as bounded by the shore. Act of December 18, 1837, 2 Laws, Republic of Texas, p. 84 (Liberty County: "* * * along said Gulf [of Mexico] with all its meanderings * * *"); Act of December 21, 1837, 2 Laws, Republic of Texas, p. 110 (Jefferson County; "* * * along the Gulf of Mexico * * *"); Act of May 15, 1838, 3 Laws, Republic of Texas, p. 12 (Galveston County: "* * * with the coast of the Gulf * * *"); Act of January 20, 1841, Laws, 5th Congress, Republic of Texas, p. 45 (Galveston County: "* * * along the Gulf shores * * *").[23] Similarly, although the constitution required that "the republic of Texas shall be divided into convenient judicial districts" (Art. IV, sec. 2, 1 Laws, Republic of Texas, p. 13), the judicial districts established consisted only of specified counties, thus again omitting any provision for the area of the marginal sea. Act of December 22, 1836, 1 Laws, Republic of Texas, p. 198, as amended by the Act of May 24, 1838, 3 Laws, Republic of Texas, p. 30; Act of January 29, 1840, Laws, Republic

[23] By its Act of May 25, 1947, c. 287, General and Special Laws, 1947, p. 490, Texas for the first time undertook to extend its counties bordering on the Gulf, to make them coterminous with the then boundaries of the State, under State laws.

of Texas, 4th Congress, p. 176; Act of January 18, 1844, Laws, Republic of Texas, 8th Congress, p. 24.

c. As for territorial jurisdiction, there is no doubt that the Republic openly claimed the marginal sea within its *boundaries* (Act of Dec. 19, 1836, *supra*, p. 47, *infra*, p. 81), but there is nothing to show, as we have said, that the claim secured international recognition during the Republic's life. On the contrary, a grave, if not fatal, defect in this unilateral declaration stems from its apparent conflict with the binding treaties of 1819 and 1828, defining Texas boundaries, between the United States and Spain and the United States and Mexico, to which Texas expressly adhered in 1838. By the Treaty of Amity, Settlement, and Limits, of February 22, 1819, with Spain (8 Stat. 252), the United States renounced all claim to any part of the territory which is now the State of Texas (8 Stat. 256). Article 3 fixed the boundary line between the two countries west of the Mississippi as beginning

> *on the Gulph of Mexico, at the mouth of the river Sabine, in the sea,* continuing north, along the western bank of that river, to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Nachitoches, or Red River; then following the course of the Rio Roxo westward, to the degree of longitude 100 west from London and 23 from Washington; then, crossing

> the said Red River, and running thence, by a line due north, to the river Arkansas; thence, following the course of the Southern bank of the Arkansas, to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. [8 Stat. 254–256; *United States* v. *Texas,* 162 U. S. 1, 27; italics supplied.] [24]

Thus, the 1819 treaty fixed the boundary *at* the Gulf of Mexico, and not three miles or three leagues from shore.

After Mexico established its independence from Spain, this country and Mexico entered into a "Treaty of Limits," on January 12, 1828, which expressly reaffirmed the boundary limits set by the 1819 Treaty, repeating them in terms—including the opening phrase: that the line was to "begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea"—and requiring both nations to regard this boundary as "still in force and binding." 8 Stat. 372, 374.[25]

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[24] Article 4 also provided that to fix the boundary with more precision, a commission was to be appointed to run and mark the line "from the mouth of the Sabine to the Red river, and from the Red river to the river Arkansas, and to ascertain the latitude of the source of the said river Arkansas," in conformity with Article 3, and "the line of latitude 42, to the South Sea" (8 Stat. 256).

[25] The 1828 Treaty also provided for a commission to run and mark the line "from the mouth of the Sabine" (8 Stat. 374), but the commission never was appointed, due to the secession of Texas from Mexico and recognition of the new republic by the United States.

By its Convention of April 25, 1838, with the United States, the Republic of Texas recognized that the 1828 Treaty was binding on it. Like the predecessor agreements, the Convention provided for the designation of commissioners to "proceed to run and mark that portion of the said boundary *which extends from the mouth of the Sabine, where that river enters the Gulph of Mexico,* to the Red river", (italics added). 8 Stat. 511; *United States* v. *Texas,* 162 U. S. 1, 29–31. In 1840, the joint commission met and actually marked the beginning of its survey on the shore of the Gulf of Mexico. S. Doc. 199, 27th Cong., 2d Sess., p. 59; H. Doc. 51, 27th Cong., 2d Sess., p. 63.

The sum of these international agreements, to which this country was a party and which were accepted as binding by the Republic of Texas, is that, whatever Texas' internal statutes may have provided or intended, the Republic had solemnly bound herself to the United States to regard her boundary as commencing "*on* the Gulf of Mexico * * * in the sea," and not "*along* the Gulf of Mexico three leagues from land." Later, after Texas' admission, and in sharp contrast, the Treaty of Guadalupe Hidalgo between the United States and Mexico (signed February 2, 1848, proclaimed July 4, 1848), did set the international boundary "*in* the Gulf of Mexico, three leagues from land."

9 Stat. 922, 926 (all italics added), *infra*, p. 99.[26] But in 1845, when Texas joined the Union, there is firm ground for saying that, under its own treaties, and at least insofar as the United States was concerned, the marginal sea was not "properly included within" or "rightfully belonging to" its territory.[27]

B. *The fact that Texas was an independent nation before it entered the Union is immaterial.*

Texas also appears to find support for its claimed special position in the fact that, unlike California, it was an independent nation before it joined the Union. The argument seems to be that the Republic of Texas was possessed of the marginal belt, and the State automatically succeeded to its rights. To the extent that this contention differs from the assertion that the Republic owned the belt and the State retained it by virtue of the "vacant and unappropriated lands" clause of the annexation resolution—the

[26] The British Minister to the United States objected to the boundary clauses of the Treaty of Guadalupe Hidalgo of 1848 because of the three-leagues provision. *Supra*, p. 51. Secretary of State Buchanan wrote in reply that the treaty "can only affect the rights of Mexico and the United States." Crocker, *Extent of the Marginal Sea* (1919), p. 649.

[27] It is an indication, at the least, that the Republic's internal designation of its boundaries was inconclusive in this country's eyes, that the annexation resolution specifically provided that the new state was to be formed "subject to the adjustment by this Government [*i. e.*, the Federal Government] of all questions of boundary that may arise with other governments" (*infra*, p. 82). See *supra*, pp. 39–40.

argument which we have just discussed in Point II, A, *supra*, pp. 22–52—it is equally erroneous. The initial premise for any consideration of a claim growing out of the Republic's independent status must be the complete acknowledgment that it is not the Republic's constitution and laws but the Constitution of the United States, and the terms of Texas' admission, which authoritatively determine the present relationship between the State of Texas and the Federal Government, including the nature and incidents of their respective sovereignties, and the ownership and control of the marginal sea. This fundamental principle Texas has admitted. Very soon after coming into existence, the State gave formal expression to its recognition that the nature of its rights in the land within its boundaries was to be determined by reference to the Federal Constitution as well as the joint resolution for annexation. By Joint Resolution of April 29, 1846 (*infra*, pp. 88–89), the legislature of the State declared that "the exclusive right to the jurisdiction over the soil included in the limits of the late Republic of Texas * * * is now vested in and belongs to the State, *excepting such jurisdiction as is vested in the United States, by the constitution of the United States, and by the joint resolution of annexation* * * *." [Italics supplied.] The Republic's laws and claims of title are relevant, therefore, only insofar as the State can

properly succeed to them under the Federal Constitution and the terms of its admission.

On this basis, our argument in this subpoint (II, B), is, *first,* that the Republic of Texas did not own the marginal sea, and the State therefore has no title acquired by succession; *second,* that the Republic did not have control over the marginal sea, and the State can therefore base no claim on such control; *third,* that even if the Republic did control (but did not own) the maritime belt, the State's claim to ownership does not follow; and, *lastly,* that, taking at full value the assertion that the Republic of Texas owned and controlled the marginal sea, the State of Texas does not stand in its place.[28]

1. It is, of course, a necessary condition of the State's claim that the Republic of Texas had proprietary rights in, or had control over, the marginal sea. If it did not have valid ownership or control, there is not the slightest basis for asserting ownership rights in the State as its "successor." *United States* v. *California,* 332 U.

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[28] We assume, throughout Point II, B, that the "vacant and unappropriated lands" clause is inapplicable for any or all of the reasons given in Point II, A, *supra.* See fn. 29, *infra,* p. 55.

There is no other specific clause of the annexation and admission resolutions upon which, to our knowledge, Texas rests its claim, or on which it can rely. Aside from the "vacant and unappropriated lands" clause, the State's argument builds on an asserted general right of succession by the State to the Republic's rights.

S. 19, has determined conclusively, at the very minimum, that admission to the Union did not bestow title to the marginal sea upon States which had no prior claim to the area. Absent ownership or full control by the Republic, Texas' position would be exactly the same as that of California, and we do not believe the State will claim otherwise.[29]. But, as we urged in Point II, A (*supra*, pp. 44–52), it is very doubtful whether the Republic did rightfully own, or even lay claim to ownership of, the territorial belt.

2. Even the Republic's lesser claim to rightful control of the marginal sea as within its boundaries is likewise feeble, as we have also argued (*supra*, pp. 45–52).[30] Without at least such prior rightful control, the State obviously stands in a still worse position.

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[29] The State may possibly claim that even if the Republic did not own or control the marginal sea, the State does own it because the "vacant and unappropriated lands" clause affirmatively endowed it with the area. We have shown (*supra*, pp. 22–52), that this claim is unsupportable because (a) the clause was intended to cover no more than lands already owned by the Republic at the time of annexation, which the State was to "retain," and (b) in any event, the clause was not intended to, and does not, include the marginal belt. In this subpoint (II, B), we assume that the "vacant and unappropriated lands" clause does not help Texas' claim. See fn. 28, *supra*.

[30] As already noted, the annexation and admission resolutions only consented to the reception of "the territory properly included within, and rightfully belonging to the Republic of Texas * * *." *Infra*, pp. 82, 87; *supra*, pp. 44–45.

3. But even conceding, for the moment, that the Republic did properly have some *control* over the marginal belt, the State of Texas is not aided in its claim of present *ownership,* for two separate reasons:

First, the Republic's interest in the belt did not pertain to its internal and domestic sovereignty, to which the State can be said to have succeeded, but only to its national external sovereignty, to which the United States has plainly succeeded. *Supra,* pp. 35–37; *infra,* p. 58. We have shown (pp. 47–49) that the Republic did not include the marginal sea in dividing up its counties, although its constitution required it to be "divided into convenient counties," and likewise did not include this belt in its division of the country into judicial districts. In thus failing to establish the machinery of domestic government over the area of the marginal sea, the Republic plainly recognized that that area was of concern primarily in relation to its external sovereignty and national affairs. This recognition is all the more striking because unnecessarily broad. Some domestic police power can properly be exercised even by a State of the United States over the area of the marginal sea. *Toomer* v. *Witsell,* 334 U. S. 385, 393; *United States* v. *California,* 332 U. S. 19, 36. The Republic of Texas, having both domestic and external sovereignty, was under no compulsion to distinguish or separate the two and might naturally have been expected to im-

plement fully its unitary sovereignty throughout its territorial jurisdiction. Its failure to do so emphasizes the primarily national and external character of its interest in the marginal sea. See also *supra*, pp. 32, 47 (non-inclusion of the marginal sea in the Republic's public land system).

Secondly, the fullest exercise by the Republic of *control*—but not ownership—over the marginal sea, internally and externally, would not justify the State in asserting a title as successor *owner*. There is an open gap, which cannot be leaped, between territorial-jurisdiction, alone, on the part of the Republic, and full ownership by the State. If the Republic, in December 1845, had no more than territorial jurisdiction and control over the belt, then the State, on December 29, 1845, could not have acquired the greater interest of a full-fledged property right and title. Certainly, no special clause in the annexation and admission resolutions converts prior non-ownership into future ownership,[31] and the *California* decision—again reading it narrowly in the State's favor—indisputably holds that neither the "equal footing" provision nor the Federal Constitution grants ownership of the marginal sea to new states. There is, thus, nothing on which to peg a claim of future title. It is noteworthy that California, like Texas, claimed the three-mile belt

[31] See fn. 29, *supra*, p. 55.

within its territorial jurisdiction in 1849, before its admission. The fact that Texas was an independent nation while California was an unorganized territory cannot have even slight bearing on the claim of sudden conversion, upon admission, of nonownership into ownership.

4. Finally, the Government denies that the State of Texas has any proprietary rights in the marginal sea, even if the Republic of Texas had full ownership and control. On admission, Texas necessarily gave up any such rights to the United States.

a. Upon Texas' admission, it clearly abandoned, under the Constitution, the external sovereignty it previously had as an independent country, and thereafter for the people and State of Texas the United States alone was fully possessed of national external sovereignty and charged with the carrying on of international relations and the conduct of external defense. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 316–317; *United States* v. *California*, 332 U. S. 19, 35–36. This transfer of national sovereignty, required by the Constitution, was also marked—as we have shown above—in the very provisions of the annexation resolution,[32] and contemporaneously recognized by Texas officials. *Supra*, pp. 35–37.

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[32] We refer particularly to the boundary adjustment clause, and the clause requiring the cession of all defense "property and means." *Supra*, pp. 35–40; *infra*, pp. 82–83, 87.

The principle of the *California* case is that the Federal Government rather than the State has paramount rights in and power over the belt (including full dominion over the oil and other resources of the soil underlying that water area) because protection and control of the marginal sea "has been and is a function of national external sovereignty," and because "national interests, responsibilities, and therefore national rights are paramount" in that area. 332 U. S. at 34, 34–36, 38–39; *supra*, pp. 19–20. So far as national external sovereignty and national interests and responsibilities are concerned, Texas' coast is no different from California's. The needs of national defense and the conduct of foreign affairs are equally closely related to both maritime belts.[33] It cannot be supposed that the national security, which everywhere else requires that the United States have paramount rights in the land and resources under the marginal sea, requires less in the case of Texas, or that along the shores of Texas, alone of all the maritime States, the Federal Government should lack the means essential to performance of its sovereign functions and preservation of its own existence. As in the *California* case, the "very oil about which the state and nation here contend might well become the subject of international dispute and settle-

[33] In the case of Texas, the annexation resolution specifically recognized this direct connection by requiring the cession of "ports and harbors." *Supra*, pp. 38–39.

ment." 332 U. S. at 35. Hence, when Texas came into the Union, the United States acquired the same right and duty of "protection and control" of the marginal sea off Texas as it has in the marginal sea off the coasts of other maritime States. It follows that it necessarily acquired the same paramount rights in, and dominion over, the Texas marginal sea.

If the Republic of Texas was ever possessed of ownership, paramount rights in, and full dominion over the marginal sea off its shore, as an incident of its national sovereignty, the State of Texas in entering the Union necessarily relinquished to the United States all attributes of this external sovereignty, including, of course, the responsibility for protection and control of the marginal sea and the paramount rights therein. In the absence of any contrary provision in the resolution under which Texas was admitted to the Union—and there is none[34]—the United States likewise succeeded to all incidents of such paramount powers, one of which is full dominion and control of the resources of the bed of the marginal sea.

Similarly, if the Republic's claim to ownership and paramountcy was no more, in 1845, than a potential one, which could possibly ripen into full and recognized title in the future, the claim passed to the United States together with the Re-

[34] See fn. 28–29, *supra*, pp. 54–55.

public's national sovereignty. See *supra*, pp. 46–47.

b. The "equal footing" clause governing Texas' admission into the Union stoutly confirms this conclusion.[35] The clause is the classic expression of the constitutional equality of all states. "Equality of constitutional right and power is the condition of all the States of the Union, old and new." *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 689. This is a union of "States, equal in power, dignity and authority * * *," and "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." *Coyle* v. *Oklahoma*, 221 U. S. 559, 567, 580.

Hitherto, in the general controversy over the marginal sea, the "equal footing" clause has been cited by the individual States to warrant the claim of title asserted by the post-Revolution States to the three-mile belt, on the assumption that the original thirteen held such title; in *California*, this Court destroyed that reliance by finding that the original States did not acquire ownership of the belt or the soil under it. 332 U. S. at 31–32. See also *Toomer* v. *Witsell*, 334 U. S. 385, 402. In our view, the present pertinence of the clause is that it not only gives a new

[35] The clause provides:

"That the State of Texas shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever." *Infra*, p. 88.

State such additional governmental rights, powers, and privileges, as may be required to raise it to the level of the previously admitted States, but, at least in the absence of express preservation of a superior status, it also cuts down any special privileges, powers, or rights—over and above those possessed by the other States—which a new State may have possessed prior to admission because of a unique position, such as Texas' national independence. Equality of States means that they are not "less *or greater,* or different in dignity or power." *Coyle* v. *Oklahoma,* 221 U. S. 559, 566 (italics supplied). Whatever their previous status—be it organized territory, unorganized territory, independent nation, or portion of a foreign country—all new States are thereafter the same in powers and rights, and the "equal footing" provision is designed to effect that result.

Contrary to this doctrine, Texas today demands a special status simply because it was an independent nation in 1845, before its admission. The plain answer is that if its claim were allowed, it would not be "on an equal footing with the original States in all respects whatever," but on a "superior" footing, because the original States, and their successors, do not own the marginal sea, and do not have paramount rights in and power over that belt.

c. The controlling principle is the converse of that in *Pollard's Lessee* v. *Hagan,* 3 How. 212,

and the succeeding line of cases. There, the Court has held that, under the Constitution, ownership of land under inland navigable waters is an incident of a State's internal sovereignty. Accordingly, title to such land automatically passes, without specific mention, from the United States to a new State, on its admission, where the United States formerly held the title when the State was a territory. *United States* v. *Utah*, 283 U. S. 64, 75; *Scott* v. *Lattig*, 227 U. S. 229, 242–243; *Oklahoma* v. *Texas*, 258 U. S. 574, 583; *United States* v. *Holt Bank*, 270 U. S. 49, 55; see *United States* v. *California*, 332 U. S. 19, 30.

Since, as the *California* case holds, the Federal Government's paramount rights in, and power and dominion over, the marginal belt is an incident of federal sovereignty, the same principle leads to the conclusion that, on the admission of Texas, in 1845, there passed from Texas to the United States any title to, or paramount rights in or control over, the marginal sea off its coast which Texas may previously have had.[38]

C. *This suit is not barred by prescription or adverse possession.*

The State's "First Affirmative Defense", in its amended answer, appears to urge that the present suit is precluded because of prescription and adverse possession of the land here involved. Cali-

[38] Discussion of other implications of the *Pollard* decision is set forth at pp. 29–30, 41–43.

fornia raised a similar defense, and recited many incidents in support of the claim that the Federal Government had recognized its title, but the Court rejected it in terms which are just as apt here (332 U. S. at 39–40):

> As a matter of fact, the record plainly demonstrates that until the California oil issue began to be pressed in the thirties, neither the states nor the Government had reason to focus attention on the question of which of them owned or had paramount rights in or power over the three-mile belt. And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

Furthermore, it is a settled rule of federal land law that prescription and adverse possession do not run against the United States, and possession of its lands, though "open, exclusive and uninter-

rupted" over a long period of time, creates no impediment to a recovery of such lands by the United States. *Oaksmith's Lessee* v. *Johnston*, 92 U. S. 343, 347. See also *Jourdan* v. *Barrett*, 4 How. 168, 184; *Burgess* v. *Gray*, 16 How. 48, 64; *Gibson* v. *Chouteau*, 13 Wall. 92, 99; *Morrow* v. *Whitney*, 95 U. S. 551, 557; *Sparks* v. *Pierce*, 115 U. S. 408, 413; *Hays* v. *United States*, 175 U. S. 248, 260; *Northern Pac. Ry. Co.* v. *McComas*, 250 U. S. 387, 391.[37]

D. *The annexation and admission resolutions affirmatively indicate that Texas has no rights in the marginal sea lands, but that the United States has paramount rights in, and full dominion and power over, that belt.*

Our argument has been mainly keyed to disproving Texas' claim to special status, and to that end we have extensively discussed the various relevant terms of the State's admission to the Union. *Supra*, pp. 22–63. But so that this structure of the argument may not obscure the specific affirmative indications, in the admission terms, of the correctness of the Federal Government's claim, we collate at this point the pertinent clauses, for better perspective and by way of résumé.

[37] Compare the rule that statutes of limitations, except as expressly prescribed by Congress, have no application to proceedings instituted by the United States, and that the defense of laches is unavailable. *E. g. United States* v. *Summerlin*, 310 U. S. 414, 416; *United States* v. *Michigan*, 190 U. S. 379, 405.

1. *The "defence" clause.*—"Said State" shall cede "to the United States, all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said Republic of Texas." *Infra,* pp. 82–83. The pith of this clause is, of course, that the United States is charged with all matters related to national defense. In particular, the reference to "ports and harbors" indicates the federal concern with maritime defense, and the sweeping inclusion of "all other property and means pertaining to the public defense" is broad enough to cover the marginal sea. See discussion *supra,* pp. 35–39.

2. *The "equal footing" clause.*—"That the State of Texas" is "admitted into the Union on an equal footing with the original States in all respects whatever." *Infra,* p. 88. Since the original States have never owned the marginal belt, Texas cannot do so and remain on an "equal footing." Similarly, since the United States has paramount rights in the marginal sea off the coast of the other States, it must likewise have the same rights in Texas' belt if that State is to be on an equal footing. See discussion *supra,* pp. 61–63.

3. *The "boundary adjustment" clause.*—"Said State to be formed, subject to the adjustment by this government [*i. e.,* the Federal Government] of all questions of boundary that may arise with

other governments." *Infra*, p. 82. This provision indicates, at the least, that matters of national defense and foreign relations are to be the function solely of the United States; and, in our view, it also suggests, particularly in the troubled circumstances of that time, that the rights to develop and determine the extent of the marginal sea, as well as to exercise control over it, are specifically vested in the Federal Government. See discussion *supra*, pp. 39–40.

4. *The "proper territory" clause.*—"That Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State * * *." *Infra*, pp. 82, 87. Only if the marginal sea was properly included within the Republic's boundaries, and rightfully belonged to it, under the then existing treaties and international law, could there be any claim of inclusion within the State's boundaries, let alone a proprietary claim. As we have shown, the Republic's claim was dubious at best. *Supra*, pp. 44–52.

* * * * * *

The words, connotations, and implications of these four clauses—a substantial portion out of the short list of admission terms—affirmatively prove, at a minimum, that Texas is far from showing any such special status as would take her out of the *California* rule. On the con-

trary, they strongly tend to demonstrate, by themselves alone, that the United States has precisely the same rights in the marginal sea off Texas as it has in that adjacent to California. And, as we have shown in this Point II, there is nothing in the body of the State's amended answer, or in its three affirmative defenses, indicating that Texas has any greater rights than California.

## III

### THE UNITED STATES HAS, AS AGAINST TEXAS, AT LEAST THE SAME PARAMOUNT RIGHTS IN, AND DOMINION OVER, THE LANDS UNDERLYING THE GULF OF MEXICO OUTSIDE THE MARGINAL SEA, AS IT HAS WITH RESPECT TO THE MARGINAL SEA

Unlike California, Texas asserts rights outside the three-mile belt, and even beyond the three-league belt claimed by the Republic prior to the State's admission. Texas' claim is embodied in its statutes of May 16, 1941 (*infra*, pp. 91–95), and May 23, 1947 (*infra*, pp. 96–97). By section 1 of the Act of May 16, 1941, the State purported to extend its boundary to a line in the Gulf of Mexico twenty-four marine miles beyond the three-mile limit recognized generally in international law and by the United States, and in section 3 the State asserted ownership of the bed of the Gulf within the area so extended. By section 1 of the Act of May 23, 1947, the 1941 act was amended to put the extended boundary at

the outer edge of the continental shelf.[38] In its complaint in this case, the United States asserts that it "is the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of Texas and outside of the inland waters, *extending seaward to the outer edge of the continental shelf* * * *." (Complaint par. II, italics supplied).

A. 1. Regardless of the validity of the State's attempted extension of its *boundaries* beyond three miles or three leagues, it is hardly doubtful that the United States has, as against Texas, at least the same rights in, and control and dominion over, the seas and the land lying outside the three-mile or three-league belt, as it has within the belt. Obviously, the ocean seaward of the marginal belt is even less closely related to the interests of the coastal State, and more directly connected with the national defense, the conduct of foreign affairs, and the carrying on of international commerce. The basic ground of

[38] The edge of the continental shelf along the Texas coast varies from approximately 70 miles seaward of the mouth of the Rio Grande to approximately 140 miles offshore at the Texas-Louisiana boundary. See Hearings before Subcommittee No. 1, Committee on the Judiciary, House of Representatives, on H. R. 5991 and H. R. 5992, 81st Cong., 1st sess., p. 105.

the Court's decision in *United States* v. *California*—that the Federal Government's paramount rights in, and dominion over, the marginal sea (within California's boundaries) flow directly from its interest in, and responsibility for, maintaining the country in peace, protecting it at war, promoting its world commerce, and dealing with foreign countries—applies *a fortiori* to the waters and submerged lands outside of the marginal sea. To the extent that the enlarged belt which Texas has sought to create differs from the original marginal sea, the difference is wholly against the State and in favor of the Federal Government.

The *California* opinion itself discloses explicitly that, as between the United States and a State, the same considerations govern rights in the area beyond the marginal sea. The Court refers to the absence of reason for State control "over *any part of the ocean* or the ocean's bottom" (332 U. S. at 34), and goes on to say that "whatever any nation does *in the open sea,* which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units. What this Government does, or even what the states do, *anywhere in the ocean,* is a subject upon which the nation may enter into and assume treaty or similar international obligations." (332 U. S. at 35.) Again, the

Court says, "The *ocean, even its three-mile belt,* is thus of vital consequence to the nation * * *" (332 U. S. at 35), and it refuses to transplant "the *Pollard* rule of ownership as an incident of state sovereignty in relation to inland waters out into *the soil beneath the ocean, so much more a matter of national concern*" (332 U. S. at 36; all italics supplied).[39] The express words, as well as the whole tenor of the opinion, compel the conclusion that, as against a State, the rights of the United States are at least as great in the ocean proper as in the protective belt.

2. Texas' asserted special status is of no aid to its claim outside the three-mile or three-league area. If, as we argue in the earlier portion of this brief, Texas has no special claim to the marginal sea, the additional claim as to the outer area necessarily falls with it. And even if its claim to the marginal sea were sustained, Texas would be in no better position. The grounds on which Texas asserts better rights than California in the lands under the marginal sea—that these lands were owned by the Republic of Texas and were reserved to the State by the terms of its admission to the Union—are plainly irrelevant as to lands lying outside the original marginal belt. Those lands were never owned by the Republic

[39] See also the Court's discussion of *The Abby Dodge*, 223 U. S. 166:—"And there was no argument there, nor did this Court decide, whether the Federal Government owned or had paramount rights *in the soil under the Gulf waters*" (332 U. S. at 38, italics supplied).

of Texas (*supra,* p. 49), and, since they were not within the limits of the State when it was admitted, plainly they were not reserved to the State on its admission.

B. The 1941 and 1947 Texas statutes (*supra,* pp. 68–69) raise grave questions of the State's power to extend its boundaries, but that issue need not be determined here, for, as we have shown (*supra,* pp. 69–72), the claim of the United States must prevail even if the extensions are proper. As in the *California* case, the issue here is not one of the State's *boundaries,* but of its rights and those of the United States in the ocean belt adjoining the coast, together with the underlying soil and the resources of the soil. On that issue, the matter of boundaries has no bearing, and the United States does not controvert that Texas possesses, with respect to the lands in the area described in the complaint which are validly within its boundaries, "governmental powers which it has with respect to other lands of the United States within the lawful territorial jurisdiction of the State." (Complaint, par. VI).[40]

[40] The United States never challenged the fact that the three-mile belt was within California's territorial boundaries, and conceded "that the State has legislative jurisdiction over the area from the low-water mark to the outer boundary of the State just as the State has jurisdiction over many areas of dry land which are owned by the United States." See Brief for the United States, No. 12, Original, Oct. Term 1946, pp. 4–5, 61.

Nevertheless, it is appropriate to sketch the constitutional barriers presented by this recent Texas boundary legislation.[41] In the first place, we believe that the United States alone can establish external territorial limits, since the "assertion of national dominion" over a coastal area, as well as its protection and control "has been and is a function of national external sovereignty" which the States do not possess. *United States* v. *California,* 332 U. S. at 34, 35–36; cf. *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304,

[41] The Texas statute of 1941 was discussed in a note in 20 Texas Law Review 490. The writer concluded that, in the absence of congressional approval, the State's attempt to extend its boundary in the Gulf could not be given effect except as a regulation of activities of its own citizens in the extended area. A similar Louisiana statute, on which the Texas act of 1941 was modeled (Act 55 of 1938, approved June 30, 1938, Louisiana Acts 1938, p. 169, 6 Dart, Louisiana General Statutes (1939), secs. 9311.1–9311.4), has drawn the attention of at least three contemporary writers. One concludes that the statute is valid. Borchard, *Resources of the Continental Shelf*, 40 Am. Jour. Int. Law 53 (1946). However, he bases his conclusion upon the very questionable assumption that the right to annex territory by occupation is in the State, and on the view, subsequently exploded by this Court's decision in *United States* v. *California*, 332 U. S. 19, that the State is owner of the bed of the marginal sea. 40 Am. Jour. Int. Law, at pp. 62, 64. On the other hand, the statute has been found to be beyond the power of the State by two others. Note, *Power of a State to Extend its Boundary Beyond the Three Mile Limit* (1939), 39 Col. Law Rev. 317; Ireland, *Marginal Seas Around the States* (1940), 2 La. Law Rev. 252.

316–317.[42] In the case of Texas, this exclusive federal control over all questions of external boundaries of the State was expressly recognized by an explicit provision of the annexation resolution: "Said State to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments." *Infra,* p. 82, *supra,* pp. 39–40, 66–67.

Secondly, the State frankly purports to *annex* all the lands lying between its original marginal belt and the outer edge of the continental shelf, although "the power of annexation clearly vests exclusively in the national government." Burdick, *Law of the American Constitution* (1922), p. 279. This power has been most frequently grounded upon the constitutional grant of federal power to declare and carry on war and to make treaties (*Stewart* v. *Kahn,* 11 Wall. 493, 507; *United States, Lyon et al.* v. *Huckabee,* 16 Wall. 414, 434; *American Insurance Co.* v. *Canter,* 1 Pet. 511, 542), but it has also been attributed to the power to admit new States into the Union, and to the authority, "as a Sovereign State, to acquire territory by discovery and occupation or by any other methods recognized as proper by interna-

[42] The matter has been stated thus by an eminent authority: "It [the State] can have no authority upon the high seas beyond State lines, because there is the point of contact with other nations, and all international questions belong to the national government." 1 Cooley, *Constitutional Limitations,* 8th ed., p. 249.

tional usage." 1 Willoughby, *The Constitution of the United States* (2d ed.), pp. 407–425. It is elementary that none of these powers is possessed by an individual State of the Union. On the contrary, since, as the Court declared in *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318, the federal powers to make treaties and to declare and carry on war do not depend upon their enumeration in the Constitution, and would be possessed by the United States in any event "as necessary concomitants of nationality," the power of annexation can aptly be designated as an exclusive incident of national sovereignty.

C. It remains to add, as has already been suggested, that the United States has affirmative interests and rights in the ocean beyond the marginal sea, not only as against the State, but in its capacity as a sovereign member of the family of nations—rights which the Court should vindicate by its decree. "The ocean, even its three-mile belt, is thus of vital consequence to the nation * * *," and control of the soil beneath the ocean is "a matter of national concern" (*United States* v. *California*, 332 U. S. at 35, 36).

1. In recognition of this interest, Presidential Proclamation No. 2667, September 28, 1945, declares that the "United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coast of the United States as appertaining to the United States, subject to its

jurisdiction and control * * *".[43] Since the subject matter of the proclamation lies in the field of external policy and foreign affairs, the President properly recognized the role of Congress in that field by providing in Executive Order No. 9633 of the same date (10 F. R. 12305, 3 CFR, 1945 Supp., p. 123) that the resources be under the jurisdiction and control of the Secretary of the Interior "for administrative purposes, pending the enactment of legislation in regard thereto."[44]

This assertion of national dominion over the continental shelf is binding upon the Court and the State. *United States* v. *California*, 332 U. S. at 34; *Jones* v. *United States*, 137 U. S. 202, 212–214; *In re Cooper*, 143 U. S. 472, 503. Cf. *Galveston* v. *Menard*, 23 Tex. 349, 391 (1859), where the court, after observing that the claim of the Republic of Texas to a marginal sea three leagues wide might well be questioned by other nations,

[43] 10 F. R. 12303, 3 CFR, 1945 Supp., p. 39. The pertinent text of this proclamation appears in the Appendix, pp. 97–98, *infra*.

[44] The Executive Order also provided:

"Neither this Order nor the aforesaid proclamation [*i. e.*, Proclamation No. 2667] shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit."

This *caveat* does not affect the fact that national dominion has been asserted by the United States, as against the rest of the world, over the continental shelf.

declared that "as between her own citizens, in respect to the rights to the soil, which they might respectively acquire, the boundaries, prescribed and claimed by the government, is conclusive."

2. Moreover, the political agencies of the Government have previously exercised dominion and control over areas beyond the three-mile or nine-mile belt, and in some cases over the resources of the sea and underlying soil. In *Manchester* v. *Massachusetts*, 139 U. S. 240, 258, this Court declared that "* * * all governments, for the purpose of self-protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit." Thus, Congress, to counteract smuggling, established a line for customs waters twelve miles from the coast. Act of March 2, 1799, sec. 25, 1 Stat. 627, 648; Act of September 21, 1922, sec. 581, 42 Stat. 858, 979. Such acts have been held constitutional. *Gillam* v. *United States*, 27 F. 2d 296, 299–300, certiorari denied, 278 U. S. 635. And by section 1 of the Anti-Smuggling Act of August 5, 1935, 49 Stat. 517, 19 U. S. C. 1701, the President was authorized to include the high seas within one hundred nautical miles of the coast within customs enforcement areas. In execution of the federal power conferred by Art. 1, sec. 8, cl. 10 of the Constitution, Congress early provided for punishment of crimes "committed upon the high seas." Act of April 30, 1790, sec. 8, 1 Stat. 112, 113; Act of March 3, 1825, sec. 4, 4 Stat. 115; 18 U. S. C. 451.

Where accommodation of foreign interests has been necessary to establishment of this country's rights in waters beyond the three-mile limit it has been accomplished by treaty. Thus, Article 1 of the Treaty of June 15, 1846, 9 Stat. 869, fixed the boundary between this country and British territory as the middle of the Strait of Juan de Fuca, the strait being from fifteen to twenty miles wide. Webster's New International Dictionary, 2d ed. (1948), p. 3074.

A very pertinent example of exercise of federal power beyond the three-mile limit is embodied in the Act of August 18, 1856, sec. 1, 11 Stat. 119, R. S. 5570, 48 U. S. C. 1411, providing that where a citizen of the United States discovers a guano deposit on any island not within a foreign jurisdiction and not occupied by the citizens of any other government, the island, at the discretion of the President, may be considered as appertaining to the United States. And by the Act of March 4, 1909, sec. 272, 35 Stat. 1088, 1142, 18 U. S. C. 451, Congress provided for the punishment of crimes committed on such islands.[45] The 1856 statute further provides for the exclusive occupation and right of removal of the guano by the discoverer, "at the pleasure of Congress,"

[45] Sections 308 and 309 of the same Act, 18 U. S. C. 499–500, provide punishment for certain offenses committed on any island within a wide area of the Pacific Ocean, when such island is not in the possession of or under the protection of a civilized power.

requires the guano so removed to be taken for the use of American citizens or residents only (48 U. S. C. 1414, 1415), and authorizes the President to employ the land and naval forces of the United States to protect the property right so declared (48 U. S. C. 1418). That such right is asserted and maintained without actually annexing such islands is revealed by the further provision reserving the right of the United States to abandon any such island after the natural resources have been removed (48 U. S. C. 1419). This statute, a clear assertion of *a property* right beyond the three-mile belt, was sustained by this Court. *Jones v. United States,* 137 U. S. 202, 212–214.

Other nations have also for long periods deemed the three-mile concept no obstacle to claiming certain resources of the bed of the ocean outside that limit. Typical examples are Great Britain's claim to coal beneath the seas off England's coasts and to the pearl fisheries off Ceylon. Hurst, *Whose is the Bed of the Sea?,* 4 British Yearbook of International Law (1923–1924), pp. 39, 40–41; Fulton, *The Sovereignty of the Sea* (1911), p. 376; Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), pp. 14–16; see also I Oppenheim, *International Law,* 7th ed. (1948), sec. 287c, pp. 576–578.

3. It is possible that the advancement of this country's claim to the resources of the bed of the sea outside the marginal sea may ultimately necessitate international negotiation and settle-

ment. But that was true in the *California* case, where this Court observed that "The very oil about which the state and nation here contend might well become the subject of international disputes and settlement." 332 U. S. at 35. It is likewise true here that "whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units" (332 U. S. at p. 35). In the present suit between the United States and one of its constituent states, the United States' assertion of dominant interest in the continental shelf, as against other countries, must be accepted as binding.

## CONCLUSION

The motion for judgment should be granted.

Respectfully submitted.

PHILIP B. PERLMAN,
*Solicitor General.*

A. DEVITT VANECH,
*Assistant Attorney General.*

ARNOLD RAUM,
OSCAR H. DAVIS,
*Special Assistants to the Attorney General.*

ROBERT E. MULRONEY,
ROBERT M. VAUGHAN,
FREDERICK W. SMITH,
GEORGE S. SWARTH,
WILLIAM JEFFERSON MONTGOMERY,
*Attorneys.*

FEBRUARY 1950.

# APPENDIX.

**1. Act approved December 19, 1836, 1 Laws of the Republic of Texas, p. 133:**

**AN ACT To define the Boundaries of the Republic of Texas.**

SEC. 1. *Be it enacted by the senate and house of representatives of the republic of Texas, in congress assembled,* That from and after the passage of this act, the civil and political jurisdiction of this republic be, and is hereby declared to extend to the following boundaries, to wit: beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande, thence up the principal stream of said river to its source, thence due north to the forty-second degree of north latitude, thence along the boundary line as defined in the treaty between the United States and Spain, to the beginning: and that the president be, and is hereby authorized and required to open a negotiation with the government of the United States of America, so soon as in his opinion the public interest requires it, to ascertain and define the boundary line as agreed upon in said treaty.

**2. Joint Resolution approved March 1, 1845, 5 Stat. 797:**

JOINT RESOLUTION For annexing Texas to the United States.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas; with a republican form of government, to be adopted by the people of said republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union.

2. *And be it further resolved,* That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to wit: *First,* Said State to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments; and the constitution thereof, with the proper evidence of its adoption by the people of said Republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action, on or before the first day of January, one thousand eight hundred and forty-six. *Second,* Said State, when admitted into the Union, after ceding to the United States, all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence

belonging to said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the Government of the United States. *Third,* New States, of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the federal constitution. And such States as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri compromise line, shall be admitted into the Union with or without slavery, as the people of each State asking admission may desire. And in such State or States as shall be formed out of said territory north of said Missouri compromise line, slavery, or involuntary servitude, (except for crime,) shall be prohibited.

3. *And be it further resolved,* That if the President of the United States shall in his judgment and discretion deem it most advisable, instead of proceeding to submit the foregoing resolution to the Republic of Texas, as an overture on the part of the United States for admission, to negotiate with that Republic; then

*Be it resolved*, That a State, to be formed out of the present Republic of Texas, with suitable extent and boundaries, and with two representatives in Congress, until the next apportionment of representation, shall be admitted into the Union, by virtue of this act, on an equal footing with the existing States, as soon as the terms and conditions of such admission, and the cession of the remaining Texian territory to the United States shall be agreed upon by the Governments of Texas and the United States; And that the sum of one hundred thousand dollars be, and the same is hereby, appropriated to defray the expenses of missions and negotiations, to agree upon the terms of said admission and cession, either by treaty to be submitted to the Senate, or by articles to be submitted to the two houses of Congress, as the President may direct.

**3. Joint resolution approved June 23, 1845, Laws, Ex. Sess., 9th Cong., Republic of Texas, p. 4:**

JOINT RESOLUTION, Giving the consent of the existing Government to the annexation of Texas to the United States.

Whereas, the Government of the United States hath proposed the following terms, guarantees, and conditions, on which the People and Territory of the Republic of Texas may be erected into a new State, to be called the State of Texas, and admitted as one of the States of the American Union, to wit:

[Here follow the two first sections of the joint resolution of the Congress of the United States.]

And whereas, by said terms, the consent of the existing government of Texas is required—Therefore,

*Be it resolved by the Senate and House of Representatives of the Republic of Texas in Congress assembled,* That, the Government of Texas doth consent, that the People and Territory of the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a Republican form of Government, to be adopted by the People of said Republic, by Deputies in Convention assembled, in order that the same may be admitted as one of the States of the American Union, and said consent is given on the terms, guarantees and conditions set forth in the Preamble to this Joint Resolution.

SEC. 2. *Be it further resolved,* That the Proclamation of the President of the Republic of Texas, bearing date May fifth, eighteen hundred and forty-five, and the election of Deputies to sit in Convention, at Austin, on the fourth day of July next for the adoption of a Constitution for the State of Texas, had in accordance therewith, hereby receives the consent of the existing Government of Texas.

SEC. 3. *Be it further resolved,* That the President of Texas is hereby requested immediately to furnish the Government of the United States, through their accredited Minister near this Government, with a copy of this Joint Resolution; also to furnish the Convention to assemble at Austin, on the fourth of July next, a copy of the same—And the same shall take effect from and after its passage.

**4. Ordinance of July 4, 1845, 1 Paschal, Ann. Dig. Laws of Texas, 4th ed. (1873), p. 45:**

AN ORDINANCE

Whereas the congress of the United States of America has passed resolutions providing for the annexation of Texas to that Union, which resolutions were approved by the president of the United States on the first day of March, one thousand eight hundred and forty-five; and whereas, the president of the United States has submitted to Texas the first and second sections of the said resolution, as the basis upon which Texas may be admitted as one of the states of the said Union; and whereas the existing government of the republic of Texas has assented to the proposals thus made, the terms and conditions of which are as follows:

[The two first sections of the joint resolution of the Congress of the United States are here quoted.]

Now, in order to manifest the assent of the people of this republic, as required in the above-recited portions of the said resolutions, We, the deputies of the people of Texas in convention assembled, in their name and by their authority, do ordain and declare, that we assent to, and accept the proposals, conditions, and guaranties contained in the first and second sections of the resolution of the congress of the United States aforesaid.

**5. Joint resolution approved December 29, 1845, Stat. 108:**

JOINT RESOLUTION For the admission of the State of Texas into the Union.

Whereas the Congress of the United States, by a joint resolution approved March the first, eighteen hundred and forty-five, did consent that the territory properly included within, and rightfully belonging to, the Republic of Texas, might be erected into a new State, to be called *The State of Texas,* with a republican form of government, to be adopted by the people of said republic, by deputies in convention assembled, with the consent of the existing government, in order that the same might be admitted as one of the States of the Union; which consent of Congress was given upon certain conditions specified in the first and second sections of said joint resolution; and whereas the people of the said Republic of Texas, by deputies in convention assembled, with the consent of the existing government, did adopt a constitution, and erect a new State with a republican form of government, and, in the name of the people of Texas, and by their authority, did ordain and declare that they assented to and accepted the proposals, conditions, and guaranties contained in said first and second sections of said resolution: and whereas the said constitution, with the proper evidence of its adoption by the people of the Republic of Texas, has been transmitted to the President of the United States and laid before Congress, in conformity to the provisions of said joint resolution: Therefore

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the State of Texas shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

SEC. 2. *And be it further resolved,* That until the representatives in Congress shall be apportioned according to an actual enumeration of the inhabitants of the United States, the State of Texas shall be entitled to choose two representatives.

**6. Joint Resolution approved April 29, 1846, Laws, First Texas Legislature, p. 155:**

JOINT RESOLUTION Declaring the exclusive right of the State of Texas as to the jurisdiction over the soil included within the limits thereof.

SECTION 1. *Be it resolved by the Legislature of the State of Texas,* That the exclusive right to the jurisdiction over the soil included in the limits of the late Republic of Texas was acquired by the valor of the people thereof, and was by them vested in the government of the said Republic, that such exclusive right is now vested in and belongs to the State, excepting such jurisdiction as is vested in the United States, by the constitution of the United States, and by the joint resolution of annexation, subject to such regulations and control as the government thereof may deem expedient to adopt; that we recognize no title in the Indian tribes, resident within the limits of the State to any portion of the soil thereof, and that we recognize no right in the government of the United

States to make any treaty of limits with the said Indian tribes, without the consent of the government of this State.

SEC. 2. *Be it further resolved,* That his excellency the Governor, be requested to communicate this resolution to the government of the United States, and to our senators and representatives in congress.

**7. Act approved July 23, 1919, c. 19, General Laws of Texas, 36th Legislature, 2d Called Session, p. 51:**

PROVIDING FOR LEASING OF SALT WATER LAKES, BAYS, ETC., AND OF UNSURVEYED PUBLIC FREE SCHOOL LANDS FOR THE PRODUCTION OF OIL AND GAS.

S. B. No. 56.] Chapter 19.

An Act to lease islands, salt water lakes, bays, inlets, reefs and marshes owned by the State within tide water limits, and that portion of the Gulf of Mexico within the jurisdiction of the State of Texas, and the unsurveyed public free school lands, for the production of oil and natural gas; authorizing the Commissioner of the General Land Office to adopt necessary rules and regulations in relation thereto; prescribing the terms upon which leases may be issued; providing for the advertisement of the areas before they are leased; prescribing the requirements for applications; providing for the recognition or abandonment of former surveys; prescribing how and when royalty shall be paid; appropriating the proceeds to the public free school

fund and the general revenue fund; creating a first lien in favor of the State; providing for offset wells; providing against pollution of water and authorizing the Game, Fish & Oyster Commissioner to enforce rules against such pollution; providing that leases may be transferred or relinquished to the State; providing for forfeiture of lease if the owner should fail or refuse to comply with the law and rules and regulations adopted relative thereto; providing for opening of roads as ways of ingress and egress to and from leased areas; providing for the protection of valid rights heretofore acquired and declaring an emergency.

*Be it enacted by the Legislature of the State of Texas:*

SECTION 1. All islands, salt water lakes, bays, inlets, marshes and reefs owned by the State within tide water limits, and that portion of the Gulf of Mexico within the jurisdiction of Texas, and the unsurveyed public free school lands shall be included herein and shall be subject to lease by the Commissioner of the General Land Office to any person, firm, or corporation for the production of oil and natural gas that may be therein or thereunder in accordance with the provisions of this Act, and such rules and regulations as may be adopted by said Commissioners as being necessary to the proper execution of its purposes.

* * * * *

**8. Act approved May 16, 1941, c. 286, General and Special Laws of Texas, 47th Legislature, Regular Session, p. 454:**

## SOVEREIGNTY OF TEXAS ALONG ITS SEACOASTS

S. B. No. 30. Chapter 286.

AN ACT declaring the sovereignty of Texas along its seacoast; fixing its present seacoast boundary and ownership; and declaring an emergency.

Whereas, Dominion, with its consequent use, ownership and jurisdiction over its marginal waters by a State has found support because it is the duty of a State to protect its citizens whose livelihood depends on fishing, or taking from said marginal waters the natural products they are capable of yielding; also, has found support in that sufficient security must exist for the lives and property of the citizens of the State; and

Whereas, According to the ancient principles of international law, it was generally recognized by the nations of the world that the boundary of each sovereign State along the seacoast was located three (3) marine miles distant in the sea, from low water mark along its coast on the open sea; and

Whereas, The seaward boundary of each sovereign State as so fixed is generally known as the three (3) mile limit of such State; and

Whereas, The said three (3) mile limit was so recognized as the seaward boundary of each sovereign State, because at the time it became so fixed three (3) marine miles was the distance of a cannon shot,

and was considered the distance at which a State could make its authority effective on the sea by the use of artillery located on the shore; and

Whereas, Since the said three (3) mile limit was so established as the seaward boundary of each sovereign State, modern cannon have been improved to such an extent that now many cannon shoot twenty-seven (27) marine miles and more, and by the use of artillery located on its shores a State can now make its authority effective at least twenty-seven (27) marine miles out to sea from low water mark; and

Whereas, The first Congress of the Republic of Texas passed an Act (1 Gammel's Laws, 1193) defining the boundaries of the Republic of Texas and declaring that its boundaries began at the mouth of the Sabine River and ran West along the Gulf of Mexico three (3) leagues from land to the mouth of the Rio Grande, then up the principal stream of said river to its source; and the Congress of the United States (5 U. S. Statutes at Large, 797) proposed to the Republic of Texas that it be admitted into the Union, and that Texas should retain all vacant and unappropriated land lying within its limits; and the Congress of the Republic of Texas thereafter passed a Joint Resolution accepting the terms of annexation proposed by the United States (2 Gammel's Laws, 1200), and such action of the Congress of the Republic of Texas was ratified by popular vote of the people of Texas, and Texas was admitted to the Union by virtue of a Resolution of Congress passed December 29, 1845, under which the State

of Texas retained all of its public lands (9 U. S. Statutes at Large, 108); and the first Legislature of the State of Texas declared: "That the exclusive right to the jurisdiction over the soil included in the limits of the late Republic of Texas was acquired by the valor of the people thereof, and was by them vested in the government of said Republic; that such exclusive right is now vested in and belongs to the State, (Acts, First Legislature, 1846, page 155); and under the treaty of Guadalupe Hidalgo, the boundary line between the Republic of Mexico and the United States was defined as commencing in the Gulf of Mexico, three (3) leagues from land, opposite the mouth of the Rio Grande; it is clear that the Republic of Texas and the State of Texas have from the earliest days asserted title to the ownership of that portion of the Gulf of Mexico, and the soil at the bottom thereof, out to the limit of three (3) marine leagues from shore."

Whereas, Therefore, the gulfward boundary of Texas is already located in the Gulf of Mexico, three (3) leagues distant from the shore, a width of marginal area made greater by the above Act and agreement, than the well-accepted and inherent three (3) mile limit; and

Whereas, A State can define its limits on the sea; and

Whereas, The State of Texas owns the waters of the sea and the waters of the arms of the sea, and the seashore and the shores of all arms of the sea as far inland as the high water mark within the territory of the State of Texas; and

Whereas, The State of Texas, including all parts thereof and all territory that may

be added thereto, forms a part of the United States of America, over which the said United States is authorized to exercise, and exercises, such powers and jurisdiction as the said United States is authorized by the Constitution of the United States to exercise thereover;

*Be it enacted by the Legislature of the State of Texas:*

SECTION 1. That the gulfward boundary of the State of Texas is hereby fixed and declared to be a line located in the Gulf of Mexico parallel to the three (3) mile limit, as determined according to said ancient principles of international law, which gulfward boundary is located twenty-four (24) marine miles further out in the Gulf of Mexico than the said three (3) mile limit.

SEC. 2. That, subject to the right of the government of the United States to regulate foreign and interstate commerce under Section 8 of Article 1 of the Constitution of the United States, and to the power of the government of the United States over cases of admiralty and maritime jurisdiction under Section 2 of Article 3 of the Constitution of the United States, the State of Texas has full sovereignty over all the waters of the Gulf of Mexico and of the arms of the Gulf of Mexico within the boundaries of Texas, as herein fixed, and over the beds and shores of the Gulf of Mexico and all arms of the said Gulf within the boundaries of Texas, as herein fixed.

SEC. 3. That the State of Texas owns, in full and complete ownership, the waters of the Gulf of Mexico and of the arms of the said Gulf, and the beds and shores of the

Gulf of Mexico, and the arms of the Gulf of Mexico, including all lands that are covered by the waters of the said Gulf and its arms, either at low tide or high tide, within the boundaries of Texas, as herein fixed; and that all of said lands are set apart and granted to the Permanent Public Free School Fund of the State, and shall be held for the benefit of the Public Free School Fund of this State according to the provisions of law governing the same.

SEC. 4. That this Act shall never be construed as containing a relinquishment by the State of Texas of any dominion sovereignty, territory, property or rights that the State of Texas already had before the passage of this Act.

SEC. 5. The fact that the land included within the boundaries hereinabove fixed belongs to the Permanent Public Free School Fund of this State, and that the same is believed to be oil bearing land, and that the development of same in accordance with the provisions of law governing the sale or lease of minerals belonging to said Permanent Free School Fund is a major duty of the Legislature, and requires prompt and immediate attention, creates an emergency and an imperative public necessity that the Constitutional Rule requiring all bills to be read on three several days in each House be, and the same is hereby suspended, and that this Act take effect and be in full force from and after its passage, and it is so enacted.

**9. Act approved May 23, 1947, c. 253, Texas General and Special Laws, 50th Legislature, Regular Session, p. 451:**

STATE OF TEXAS—SOVEREIGNTY ALONG GULFWARD SEACOAST

S. B. No. 400. Chapter 253

AN ACT declaring the sovereignty of Texas along its Gulfward seacoast; fixing its present Gulfward seacoast boundary and ownership; amending Section 1 of Senate Bill No. 30, Chapter 286 of the 47th Legislature; and declaring an emergency.

*Be it enacted by the Legislature of the State of Texas:*

SECTION 1. That Section 1 of Senate Bill No. 30, Chapter 286, Acts of the 47th Legislature, be and the same is hereby amended so as to hereafter read as follows:

"SECTION 1. The Gulfward boundary of the State of Texas is hereby fixed and declared to be a line beginning in the Gulf of Mexico at the mouth of the Sabine River; thence on a grid bearing S. 35 degrees 55 minutes and 22 seconds E. to the farthermost edge of the continental shelf from the Gulf Shore line; thence in a Westerly and Southerly direction with the edge of the continental shelf to a point opposite the mouth of the Rio Grande River; thence to the mouth of the Rio Grande River."

SEC. 2. The fact that the land included within the boundaries hereinabove fixed belongs to the Permanent Public Free School Fund of this state, and the state has never by statute embraced all of same within the boundary of Texas, and that the same is believed to be oil bearing land, and that the development of same in accordance with the provisions of law governing the sale or

lease of minerals belonging to said Permanent Free School Fund is a major duty of the Legislature, and requires prompt and immediate attention, creates an emergency and an imperative public necessity that the Constitutional Rule requiring all bills to be read on three several days in each House be, and the same is hereby suspended, and that this Act take effect and be in full force from and after its passage, and it is so enacted.

**10. Presidential Proclamation No. 2667, September 28, 1945, 10 F. R. 12303, 3 CFR 1945 Supp., p. 39:**

Whereas the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and

Whereas its competent experts are of the opinion that such resources underlie many parts of the continental shelf off the coasts of the United States of America, and that with modern technological progress their utilization is already practicable or will become so at an early date; and

Whereas recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; and

Whereas it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures

to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources:

Now, therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

* * * * *

**11. Article V of the Treaty of Guadalupe Hidalgo, 9 Stat. 922, 926, provided in pertinent part:**

> ARTICLE V. The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town called *Paso*) to its western termination; thence, northward, along the western line of New Mexico, until it intersects the first branch of the River Gila; (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same); thence down the middle of the said branch and of the said river, until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

## 12. Report of the Commissioner of the General Land Office of the State of Texas for the Fiscal Year Ending August 31, 1880, p. 16:

EXHIBIT D.

Showing the Liabilities of the State on the Public Domain.

The Liabilities of the State have been increased as follows:

| | | |
|---|---|---|
| By Special Act Certificates | | 5,760 |
| Veteran Donation Certificates | | 128,000 |
| Certificates issued to Counties under act March 13, 1875 | | 159,408 |
| Certificates issued to Irrigation Companies | | 5,760 |
| Certificates issued to Railroad Companies | | 2,896,640 |
| Alternate Sections, set apart for the benefit of Common Schools | | 2,896,640 |
| Lands surveyed for building of new Capitol | | 3,050,000 |
| Lands surveyed for State University | | 1,000,000 |
| Lands in 80 mile reserve from 100th Meridian west to the Rio Grande | | 6,323,200 |
| Lands north of 80 mile reserve, and west of 100th Meridian | | 4,822,000 |
| Increased liabilities | | 21,287,408 |
| Liabilities heretofore reported | | 130,523,982 |
| Total present liabilities | | 151,811,390 |
| Estimated area of the State | 172,604,160 | |
| Deduct for area of bays | 1,722,880 | |
| | | 170,881,280 |
| Liabilities as above | | 151,811,390 |
| Number of acres of Public Domain, against which there are no outstanding claims, and which are subject to locations, except tracts of 640 acres and less situated in organized counties, reserved from location by certificates, and only subject to pre-emption or sale for the liquidation of the Public Debt of the State | | 19,069,890 |

Greer County, containing 2622 square miles, is included in the estimated area of the State. If this be deducted, say 1,678,080 acres, there will remain subject to location, only 17,391,810 acres.

**13. Report of the Commissioner of the General Land Office [Texas], 1934–1936, p. 7:**

DISTRIBUTION OF THE PUBLIC DOMAIN.

Estimated Area 170,936,080.

| | | Acres |
|---|---|---|
| Grants by Spain and Mexico | | 26,280,000 |
| The State University, by the Republic | | 221,400 |
| The State University, (1876) Constitution | | 1,000,000 |
| The State University, (1883) Legislature | | 1,000,000 |
| Kiamasha Road | | 27,000 |
| To build the Capitol | | 3,050,000 |
| Parker County courthouse | | 320 |
| Palo Pinto County courthouse | | 320 |
| San Jacinto Veteran donation | | 1,169,382 |
| Disabled Confederates | | 1,979,852 |
| To pay public debt | | 1,660,936 |
| Homestead donations (preemption) | | 4,847,136 |
| Internal Improvements (irrigation, etc.) | | 4,061,000 |
| Counties for school purposes | | 4,229,166 |
| Headright and bounties | | 36,876,492 |
| Colonies (Peters, Mercer et al.) | | 4,494,806 |
| Railroads | | 32,153,878 |
| Asylums (four) | | 400,000 |
| Public Free School | | 42,400,556 |
| Total surveyed | | 165,852,244 |
| Unsurveyed (coastal areas, river beds and vacancies) | | 1,500,000 |
| Excesses in surveys (estimated) | 5,500,000 | |
| Loss by conflicts (estimated) | 2,000,000 | |
| Net | | 3,500,000 |
| | | 170,852,244 |

**14. Bascom Giles, "History and Disposition of Texas Public Domain", *Report of the Second Texas Surveyors' Short Course*, General Land Office, Austin, Texas (1941), p. 5, at p. 16:**

# DISPOSITION OF THE PUBLIC DOMAIN OF TEXAS UNDER THE GOVERNMENTS OF THE REPUBLIC AND THE STATE

| | | |
|---|---|---|
| Total area of the State to 3 mile Coastal Limit | | 170,926,000 |
| Additional area to 3 League Coastal Limit | | 1,761,000 |
| Total area | | 172,687,000 |
| | Acres | Sub-totals |
| Grants to promote citizenship and to induce immigration | | |
| By Governments of Spain and Mexico | 26,280,000 | |
| Headrights and Bounties | 36,876,492 | |
| Colonies-(Peter's, Mercer's, et. al.) | 4,494,806 | |
| Homestead Donations (Pre-emptions) | 4,847,136 | |
| | | 72,498,434 |
| Donations to Veterans | | |
| San Jacinto veterans—Act of 1879 and 1881 | 1,169,382 | |
| Confederate veterans—Act of 1881 | 1,979,852 | |
| | | 3,149,234 |
| Sold to pay Public Debts by Republic | 1,329,200 | |
| 50c Sales Scrip Act of 1879 and $2.00 Sales Scrip Act of 1887 | 1,660,936 | |
| | | 2,990,136 |
| Internal Improvements | | |
| State Capitol Building | 3,025,000 | |
| Irrigation, Drainage, Iron Works, Kiamasha Road and sundry | 4,088,640 | |
| | | 7,113,640 |
| To acquire Transportation Facilities | | |
| Grants to Railroads | 32,153,878 | |
| | | 32,153,878 |
| For Education | | |
| State University and A. & M. | 2,329,168 | |
| County School purposes | 4,229,166 | |
| Eleemosynary Institutions (4) | 410,600 | |
| Public Free School | 42,500,000 | |
| | | 49,468,934 |
| Total Surveyed Land | | 167,374,256 |
| Less conflicts (Estimated at ½ of 1%) | | 837,256 |
| Net as per original surveys | | 166,537,000 |
| Excess (estimated at approximately 1.1%) | | 1,800,000 |
| River Beds and Vacancies (estimated) | | 1,100,000 |
| Submerged coastal areas to 3 League Limit | | 3,250,000 |
| Total | | 172,687,000 |

U. S. GOVERNMENT PRINTING OFFICE 1950

# In the Supreme Court of the United States

OCTOBER TERM, 1949

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No. 13—ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF TEXAS

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**MEMORANDUM IN OPPOSITION TO THE MOTION OF STATE OF TEXAS TO PASS THE HEARING SET FOR MARCH 27**

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The United States is vigorously opposed to the State's motion to delay the hearing of this case.

From the very beginning, since December 21, 1948, when the United States presented its motion for leave to file a complaint, the proceedings herein have been marked by dilatory tactics and numerous successive attempts on the part of the State to block entirely or to delay as long as possible the hearing on the merits. At first, months went by, while the State made various frivolous objections merely to the filing of the Complaint. Thereafter, upon the filing of the Complaint, it failed to make a proper response within the time



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designated by the Court (September 1, 1949), and the Court had to reset the time within which an answer was required.

It was obvious from the inception of this litigation that the case would turn largely upon whether Texas had any valid special defenses that would render inapplicable the decision in *United States* v. *California*, 332 U. S. 19. Certainly, the attorneys for the State must have been directing their efforts in legal research over a long period toward the development of such special defenses. The brief filed by the United States is in the main merely an anticipatory reply to such defenses as the State may make.

The State is merely playing with words when it speaks of the limited time within which it may "reply" to the brief of the United States. In truth, it is the State that is strategically at an advantage, for it has had an extraordinarily long time within which to prepare a legal argument setting forth its alleged special defenses, while the United States was required to prepare its brief in answer to such anticipated defenses before receiving the State's brief. It remains primarily for the State to come forward, and set forth just what reasons it wishes to advance to justify treatment different from that accorded to California.

The case has already been characterized by delaying tactics that undoubtedly would not be tol-

erated in litigation between private parties. The State's motion for further delay should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
*Solicitor General.*

MARCH 1950.

U. S. GOVERNMENT PRINTING OFFICE: 1950

# In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 13, Original

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF TEXAS

## REPLY MEMORANDUM FOR THE UNITED STATES IN SUPPORT OF MOTION FOR JUDGMENT

We desire to comment in this memorandum on some aspects of the voluminous brief filed by the State of Texas.

### I

### TEXAS' DEFENSES SHOW NO NEED FOR THE TAKING OF EVIDENCE

Throughout its brief, the State insists that its defenses require the taking of evidence, and that the controversy cannot, and should not, be disposed of on the Government's motion for judgment, as was done in *United States* v. *California*, 332 U. S. 19 (Texas' br., e. g. pp. 17, 18–21, 25, 28–29, 32–53, 62, 68, 95–6, 112, 142, 174, 199, 200, 222–234; Memoranda and Appendix, pp. 65–7). But the nature of the defenses it has raised flatly contradict this theme. The matters set forth in

its brief show that on no substantial relevant issue now before the Court can the State properly demand the taking of testimony, a hearing before a special master, or a trial in a district court. The present proceeding has afforded full scope for the presentation of all the argument and materials with which the State can seek to support its claim of special status. No real issues of "fact"—requiring testimony, examination, or cross-examination—are presented.

A. The primary issues raised by the pleadings and briefs involve the interpretation of the annexation resolution passed by Congress on March 1, 1845, 5 Stat. 797 (Government's main brief, pp. 82–84), and the admission resolution of December 29, 1845, 9 Stat. 108 (Government's main brief, pp. 87–88). Together with the Federal Constitution, as applied in the *California* case, these two Congressional joint resolutions provide the over-all rules determining (a) whether the lands underlying the marginal sea were reserved to the new State, upon its admission, and (b) whether those lands, or the right to claim them—if they were owned, controlled, or claimed by the Republic of Texas—passed to the United States upon Texas' annexation. We do not understand the State now to deny the primacy or the pertinence of the Constitution and the two resolutions, a primacy which it formally acknowledged over a hundred years ago, in 1846. See Government's main brief, pp. 53–54.

Interpretation of the Constitution and of the two joint resolutions raises issues of law, not of fact, for decision by the Court. As in any case involving the correct construction of the Constitution, a statute, or a treaty, the parties are free to present to the Court any materials—legislative debates, preliminary drafts, hearings, diplomatic exchanges, administrative practice, legislative construction, or any other relevant materials—which they believe will support their arguments. This is traditionally and customarily done in briefs and attached memoranda, as the records of this Court bear abundant witness. It was done in the *California* case by both parties. In this case, the United States has brought forward such materials (see e. g., Government's main brief, pp. 24–28); Texas has done likewise in copious measure, and presumably it has presented its most important sources and documents. We know of no legal reason why the remaining materials, which the State says that it has (Texas' br., pp. 79–80, 141, 142, 160–1, 162, 170, 174, 179, 181, 185, 188, 194, 199, Memoranda and Appendix, pp. 65–7), could not have been made available in the same fashion, assuming, of course, that they may properly be taken into account.

B. The other issues involve the status of the marginal sealands under the Republic of Texas: i. e., whether the Republic had rightful ownership, jurisdiction, or control over this area, and,

if so, to what extent.[1] These questions are questions of law. An ultimate issue of title or ownership is, of course, sometimes dependent on the resolution of subsidiary factual questions; but just as often the ultimate issue turns solely on legal questions. Here, the pleadings and the positions of the parties show that no relevant factual matters are involved, and the answers to the issues presented are wholly furnished by legal materials.

The only relevant materials which have been suggested by anyone are drawn from the Republic's treaties, statutes, and regulations; its diplomatic history; the official pronouncements of its government; and the sources of the then recognized principles of international law. In our view, such of these materials as are pertinent prove, as a matter of law, that the Republic of Texas did not own the maritime belt, that it had no internationally recognized claim to that area, but that, at most, it had a potential claim, appertaining to its national external sovereignty, which might later be vindicated by the government to

[1] It is appropriate to note at this point that it is our argument that, regardless of the status of the marginal belt under the Republic, the State of Texas, after admission, did not have ownership or paramount rights in that zone. We make this argument as a matter of law, on the basis of the Constitution, the annexation and admission resolutions, and *United States* v. *California*, 332 U. S. 19. See Government's main brief, pp. 52–63, 22–52. It is necessary to reach the question of the Republic's relationship to the belt only if this argument is rejected.

which its national external sovereignty passed in 1845. Texas, of course, argues strongly to the contrary, but, despite its frequent references to issues of fact or "mixed questions of law and fact," its argument simply is that under its domestic law (statutes and unwritten law) and the then principles of international law, the Republic owned the nine-mile belt—as a matter of law.

The materials marshalled by the State in support of this claim are of the type normally presented to courts in briefs and arguments on legal issues. They do not call for, or even lend themselves, to oral testimony or the examination of witnesses. This is particularly true of an inquiry into the governing principles of international law, which forms the bulk of Texas' argument on this point (Texas' br., pp. 63–69, 95–112, 222–3; Memoranda and Appendix, pp. 1–50). The various written materials should be presented to the Court for its consideration, as was done in *California* and many other cases, and as has already been done here.

We fail to see, moreover, the bearing of the doctrine of judicial notice at the present stage of this proceeding (Texas' br., pp. 47–52), since the Court is asked by this motion for judgment not to determine issues of fact but questions of law—Texas, American, and international. In considering those questions of law, the Court may look, as it has always done, to the known events of history for guidance in interpreting statutes,

treaties, the principles of the law of nations, or the common law. But such historical events need not be proved by witnesses, offered in proof, or formally noticed, especially where their sole use is to aid the Court in its determination of legal questions.

In any event, we do not believe that there are any really disputable matters of *fact* which are relevant to the issue of the legal status of the marginal sea under the Republic, but if the State thinks otherwise it has been free to (a) urge the pertinence of certain defined *facts*, and (b) show that these *facts* are truly disputable. It has not chosen to do so, contenting itself with imprecise general assertions that there are "facts" bolstering its defense which it has not yet brought forward. A demand for trial can hardly be founded on such unsupported generalities.

## II

### THE REPUBLIC OF TEXAS DID NOT HAVE EITHER RIGHTFUL JURISDICTION OVER, OR OWNERSHIP OF, THE OFFSHORE LANDS.

Texas contends that from 1836 to 1845 it had rightful ownership and territorial control over the three-league maritime belt.[2] Such rightful ownership or control can be shown only if (a) the concept of the marginal sea existed in definite form and had achieved general international recognition in that period, (b) the concept at

[2] See footnote 1, *supra*.

that time contemplated paramount or proprietary rights in the adjacent state, and (c) the Republic's claim was both internationally recognized and consonant with its governing treaties. In our main brief (pp. 45–52), we have pointed out that these necessary conditions cannot be shown. Texas' massive but uncritical array of materials (Texas' br., pp. 53–135; Memoranda and Appendix, pp. 1–50) does not require any modification in our position. Some comments may, however, be appropriate.

A. Much, if not most, of the ground has already been covered in *United States* v. *California*, 332 U. S. 19. The Court determined, after elaborate presentation of the "evolution of powers over marginal seas exercised by adjacent countries" (332 U. S., at 31), that "At the time this country won its independence from England [1783] there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders." 332 U. S., at 32. Shortly after independence, American statesmen "became interested in establishing national dominion over a definite marginal zone to protect our neutrality," and the first official American claim for a three-mile zone was put forward in 1793. 332 U. S., at 33.

Largely as a result of American efforts, the Court points out, the definitive idea of a marginal belt "has apparently at last been generally accepted throughout the world, although as late as

1876 there was still considerable doubt about its scope and even its existence. See *The Queen* v. *Keyn*, 2 Ex. D. 63." 332 U. S., at 33.

With this line of gradual development, it can hardly be shown that the concept achieved its present maturity and form in the first part of this period of growth, i. e., from 1793 to 1845. In fact, its general acceptance and recognition by the nations of the world occurred in the latter part of the 19th and the beginning of the 20th centuries, after Texas had been admitted to the union. See Brief for the United States, *United States* v. *California*, Oct. Term 1946, No. 12—Orig., pp. 30–34, 37–40, 45–50, 51–53, 53–57, 114–115, 141–142. Certainly, in 1845, any general recognition of the present status of the marginal sea was still far in the future.[3]

B. Texas rests its argument for full development and international acceptance of the Republic's nine-mile belt on a combination of irrelevant or non-authoritative sources.

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[3] Contrary to Texas' statements (br., pp. 64, 98–100, 107), in the *California* case the position of the United States did not depend upon the claim that it acquired full dominion or paramount or proprietary rights in the marginal belt off California from Mexico in 1846 or 1848, or that the concept of the 3-mile belt was fully developed at that time. Rather, the Government's position was that the United States acquired whatever rights or claims Mexico then had in, or to, the marginal sea. It formed no part of our argument to show that the rights were or were not full-grown or mature in 1846 or 1848.

First, the Republic's recognition by the United States and a few other countries (Texas' br., pp. 54–57, 69–74) does not show that these countries accepted the Republic's own statement as to its boundaries; recognition alone never imports such acceptance of a country's maritime belt claims, or the United States would long since have had to acknowledge a marginal sea of four miles off Sweden, six miles off Spain, Turkey and several other nations, ten off Italy, and twelve off Portugal. And there is no suggestion that any of these nations specifically confirmed or recognized, by treaty or in any other way, the claimed Texan belt.[4]

Secondly, general statements of individual American legislators, on various occasions including the debate on the unratified treaty of 1844, as to the Republic's "boundaries" (Texas' br., pp. 70, 78–79, 83–84, 87–88) prove nothing, especially

[4] On the contrary, as we urge in our main brief, the Texas claim appears to be inconsistent with treaties binding on the Republic and expressly confirmed by it. See Government's main br., pp. 49–52. It is interesting to compare the State's comment (in connection with its argument that the 1838 Convention involved merely a portion of the boundary, excluding the part in the Gulf of Mexico) that "instances are rare in which two adjacent littoral nations have specifically surveyed and marked the water boundaries between their adjacent marginal seas" (Texas' br., p. 76) with its own description of the marking of the boundary between the United States and Mexico after the 1848 Treaty of Guadalupe Hidalgo had fixed the boundary in the Gulf, 3 leagues from land (Texas br., p. 88–89).

since most of them were made in connection with certain disputed *land* portions of the claimed Texas boundary, and attention was not focussed on the marginal sea.[5]

Thirdly, reliance on post-annexation history (Texas' br., pp. 82–95) is misplaced. The Treaty of Guadalupe Hidalgo, and its successors, did not purport to establish any marginal belt along the Texas shore in the Gulf (Government's main br., p. 99), but only marked the boundary between the United States and Mexico, at the point where the two countries meet at the Rio Grande. Nothing in those treaties even mentions a maritime belt. In any case, post-admission development, recognition, and acceptance of a marginal belt off the State of Texas does not go to show that the Republic's earlier claim was valid during the period of its existence, any more than the development and recognition of such a zone off the

[5] Similar comment applies, with perhaps even greater force, to the comparable quotations which the State has excerpted, in its discussion of the "boundary adjustment" clause of the annexation resolution (Texas' br., pp. 174–178), from the speeches of three or four members of Congress in 1850. The quoted comments were all made in strong opposition to the portion of the Compromise of 1850 which provided for the relinquishment by Texas of her *claims to* certain western territory, and the establishment of the Territory of New Mexico. Congress enacted such a measure, despite this opposition. Act of Sept. 9, 1850, 9 Stat. 446. See *United States* v. *Texas*, 162 U. S. 1, 33–34, 39. See Texas' br., pp. 87–88. This boundary dispute forms a well-known page of American history.

shore of any other state reaches back into prior decades. *United States* v. *California*, 332 U. S. 19.

Fourthly, no aid can be drawn from the Republic's own statements or pronouncements (Texas' br., pp. 53–59, 77–78, 120–123, 125–131). As the Texas Supreme Court pointed out in 1859, this "claim of the republic upon her coast" must be considered as having had conclusive internal validity but, at the same time, it "may not have been admitted by other nations * * *" (*City of Galveston* v. *Menard*, 23 Tex. 349, 391). It is international acceptance, not domestic unilateral assertion, which is decisive here. *United States* v. *California*, 332 U. S. 19, 32–33. The annexation resolution confirms this by expressly conferring upon the Federal Government the right to adjust Texas' international boundaries, and by admitting only "the territory properly included within, and rightfully belonging to the Republic of Texas." See Government's main brief, pp. 39–40, 44–52, 66–67.

Lastly, the State collects a body of statements by publicists, from 1670 to 1950 (Texas' br., pp. 63–69, 100–108, 128–130; Memoranda and Appendix, pp. 18–50). Such writings have, of course, far less weight than judicial decisions or the actual practice of nations (*The Queen* v. *Keyn*, L. R. 2 Exch. Div. 63, 202 (1876)), and little attempt has been made to show the extent

to which actual practice or judicial authority respecting the marginal sea had developed by 1845. And the decisions of the highest British courts—the *Keyn* case, in 1876, and *Attorney General for British Columbia* v. *Attorney General for Canada* [1914] A. C. 153, 174–175* (discussed in Government's main brief, p. 46, and in the Government's brief in *California*, pp. 47–50, 74–75, 114–115, 138)—show, at the very least, that the principle of the adjacent state's paramountcy in, or full ownership of, the marginal sea cannot be said to have achieved international acceptance in the first half of the nineteenth century.

Moreover, the State's brief uncritically accepts the writings of those like Hale who, in the 17th, 18th, and early 19th centuries, advanced the discredited and extravagant motion that the Crown owned the seas. See Brief for the United States in *United States* v. *California*, No. 12—Original, Oct. Term, 1946, pp. 24–26, 112–115, 140–142. The precise position of many of the other early publicists quoted or cited (Texas' br., pp. 65–69, 100–106; Memoranda and Appendix, pp. 18–30)—especially with regard to the distinction between territorial sovereignty and actual ownership, and that between susceptibility to ownership by actual

* Lord Haldane said, in that case, that conclusion had not yet been reached "on the question whether the shore below low water mark to within three miles of the coast forms part of the territory of the Crown or is merely subject to special powers necessary for protective and police purposes."

use and present ownership itself—is much less clear than the State indicates in the Chart in its Appendix. And the lack of general support, among the textwriters, for a three-league belt is evident. See also the Government's brief in *California,* pp. 31–34, 116–121.

## III

### THE ANNEXATION AND ADMISSION RESOLUTIONS DID NOT RESERVE TO THE STATE THE LANDS UNDERLYING THE MARGINAL SEA

Our argument that the annexation and admission resolutions did not reserve to the State the lands beneath the maritime belt (assuming that the Republic rightfully owned, had paramount rights to, or possessed a potential claim in, that zone) is set forth in the Government's main brief at pp. 22–44, 52–63, 65–67. Texas' answer to this contention (Texas' br., pp. 136–192) contains much unsupported dogmatic assertion and repeated intimations that there exist conclusive materials bearing on the resolutions' meaning, but the materials actually supplied in the brief appear to us to be either irrelevant, torn from context, or unworthy of much consideration. We should like to point out some of the deficiencies of this type which a first reading of the brief has revealed.

1. For instance, with regard to the "defence clause" of the annexation resolution (Government's main brief, pp. 35–44), much is made of inventories of certain of the Republic's defence

property, as well as of plans (in 1846) for a transfer of possession to the Federal Government (Texas' br., pp. 143–150, 163–4). The argument is that the "defence clause" required an actual future cession, and only the later-inventoried property can be considered as having been ceded.[7] This interpretation is contradicted, in the first place, by the wording of the clause (Government's main brief, pp. 82–3) which plainly conditions the retention of "vacant and unappropriated lands," as well as of all public funds, on the transfer of "defence property," and thus indicates that the cession and the counterbalancing retention were to be simultaneous with admission. Secondly, Texas' present theory is denied by the terms of the Act of September 9, 1850, 9 Stat. 446–447 (referred to in footnote 5, *supra*) which provided, as part of the Compromise of 1850, that Texas was to relinquish all claim to federal liability for its debts, and also claim for compensation for the surrender to the United States of certain named defence property *"which became the property of the United States at the time of the annexation"*. [Emphasis supplied.] The State accepted this proposition and agreed to be bound by it. 9 Stat. 1005–6.

[7] Even if this were so, it would not meet our primary argument that the "vacant and unappropriated lands" clause must be read in the light of the intention, evidenced by the "defence clause," that the United States was to have all property related to the national defence. See Government's main brief, pp. 35–39.

Thirdly, in *State* v. *Jadwin*, 85 S. W. 490 (Tex. Civ. App., 1904) (cited in Texas' br., pp. 191–2), the Texas Court of Civil Appeals expressly notes (in a portion of the opinion not quoted in the State's brief) that the State conceded "That all property falling within this description [i. e., the "defence clause"] passed to the federal government upon the admission of the state into the Union * ** *." 85 S. W., at 491. The court agreed with that position,[8] and decided the case against the Federal Government only because the land involved had not been shown to be a part of a certain fort maintained by the Republic at the time of admission and immediately abandoned; the land on which the fort had rested was agreed to be federal property, and there was no suggestion that an inventory or an actual transfer was a necessary prerequisite.

2. Another curious citation is the attempt to prove that the words "ports and harbors" in the "defence clause" meant only such ports and harbors as formed part of the Republic's naval installations, simply by reference to some general words from an unadopted (and apparently undiscussed) amendment offered in the Senate, in

[8] The court said: "Whether, then, the federal government thereby acquired any land on the east end of Galveston Island, depends on whether at the date of admission into the Union the republic of Texas had devoted any land at that point to defensive purposes." 85 S. W., at 491. The court held that the evidence showed that a fort had been maintained at that spot.

1846, to a bill which never became law (Texas' br., pp. 146–148).[9]

3. Again, as authority for calling the annexation and admission resolutions a "treaty," Texas' brief quotes some sentences of Mr. Brengle (br., p. 136, fn. 1) taken, as the Congressional Globe reveals, from a speech entirely devoted to showing that Texas could not be admitted by the method of joint resolution, but only, if at all (which he considered doubtful), by a treaty ratified by the Senate. In all charity, we would call this a rather inverted type of "authority."

4. The State's own discussion of the separate estate in mines and minerals under Spanish law (Texas' br., pp. 112–124; Memoranda and Appendix, pp. 68–107) indicates that the omission of the words "mines and minerals" from the final cession clause of the annexation resolution had nothing to do with mines and minerals under the marginal sea (Texas' br., pp. 151–2). Congress intended that the State should retain whatever interest it had in mines and minerals under all fast lands, just as it was to retain fast land which was vacant and unappropriated, and there-

[9] Moreover, the face of the proffered amendment shows that it will not bear the construction put upon it by Texas. Its purpose was no more than to authorize the appointment of an army, a navy, and a customs officer to accept possession of military, naval, and customs property, respectively, and the words the State relies on were simply used, as general descriptive terms, to differentiate the property to be received by the naval officer from that to be accepted by the other two. See Texas' br., p. 147.

fore the joint resolution did not ask the transfer of mines and minerals.

5. The State's discussion of the "vacant and unappropriated lands" clause (Texas' br., pp. 153–162) wholly disregards (a) the statement in the annexation resolution that the reserved lands were "to be applied to the payment of the debts and liabilities of the Republic of Texas," and the history of the negotiations to which we refer in our main brief (pp. 24–28), (b) the holding and opinion of this Court in the *California* case (332 U. S., esp. at 34–35, 38–39), and (c) the indisputable equivalence of "vacant and unappropriated" to "public" lands. The broad language quoted (Texas' br., p. 158) from *Mobile* v. *Eslava,* 16 Pet. 234, was, of course, implicitly modified by the holding in *Pollard's Lessee* v. *Hagan,* 3 How. 212, which held that the "waste and unappropriated lands" clause of Alabama's admission act did not cover tidelands; Justice Catron dissented, indicating that his opinion in *Mobile* was being rejected. 3 How., at 235.

6. The twisted treatment of legislative materials relating to the "boundary adjustment" clause of the annexation resolution has already been commented on in footnote 5, *supra.*

## IV

### TEXAS' ENTIRE ARGUMENT REJECTS THE RATIONALE OF THE *CALIFORNIA* DECISION

Though it purports to present merely a special case which can be decided in its favor without

dislodging the *California* decision (Texas' br., pp. 30–35), Texas' whole argument is bottomed on a flat rejection of *California*.

The State's basic argument about the need for the taking of evidence takes no account of the statement in the *California* opinion that the Court perceived "no such necessity at this stage of the case." 332 U. S., at 24. Its contention as to the status of the marginal sea from 1836 to 1845, in its full territorial and proprietary aspects, refuses to accept the Court's reading of the history of the belt's gradual international acceptance. 332 U. S., at 32–3. The points as to the "common law" ownership of lands beneath the marginal sea (Texas' br., pp. 125–131) conflict with the Court's holding as to the thirteen original colonies, as well as the reference to the doubt on that score in England as late as 1876. 332 U. S., at 31–2.

Further, the State's discussion of the "equal footing" clause and the claim that in 1845 it covered all submerged lands (Texas' br., pp. 164–174) are, of course, directly contrary to the Court's interpretation of California's "equal footing" clause of 1850. Similarly, the arguments as to "prescription" (Texas' br., pp. 192–196) and "estoppel" (Texas' br., pp. 196–200; see also pp. 184–192) find their own refutation in the consideration of those issues in the earlier case. 332 U. S., at 37–40.

Finally, the repeated insistence that paramountcy and full control over the marginal sea, or the open ocean, have nothing to do with external sovereignty, the national defense, or the conduct of foreign affairs (Texas' br., pp. 165–169, 179–184, 200–217) cannot stand with the fundamental theme of the Court's opinion in *California*. The State's argument runs boldly counter to such statements as that "protection and control of it [the three-mile belt] has been and is a function of national external sovereignty" (332 U. S., at 34); that little can "be said in favor of state control over any part of the ocean or the ocean's bottom" (322 U. S., at 34); that "The three-mile rule is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location. It must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars waged on or too near its coasts" (322 U. S., at 35); that "The very oil about which the state and nation here contend might well become the subject of international dispute and settlement" (322 U. S., at 35); that "The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks" (322 U. S., at 35–36); and that "national interests, responsibilities, and therefore national rights are para-

mont in waters lying seaward in the three-mile belt" (322 U. S., at 36). In particular, the entire argument as to Texas' rights in the area seaward of the marginal belt—in which it does not claim as successor to the Republic—is in indisputable contradiction with the Court's statements and reasoning in *California*. And the whole brief ignores the pervading principle that "The crucial question on the merits is not merely who owns the bare legal title to the lands under the marginal sea. The United States here asserts rights in two capacities transcending those of a mere property owner. In one capacity it asserts the right and responsibility to exercise whatever power and dominion are necessary to protect this country against danger to the security and tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean. The Government also appears in its capacity as a member of the family of nations. In that capacity it is responsible for conducting United States relations with other nations." (332 U. S., at 29).

On almost every crucial issue, therefore, Texas' argument rejects the premises of *United States* v. *California*. It has not sought to place its defense within the structure established by that case, but rather to attack its foundations and rationale. The only proper conclusion is that, as we have always maintained, the California de-

cision is controlling and Texas has shown no adequate reason for special treatment.

Accordingly, it is the United States, rather than Texas, which is entitled to the submerged lands here in controversy, and any claims by the State, however made, are without basis. The suggestion in our main brief (p. 72) that the issue of validity of the 1941 and 1947 Texas statutes, purporting to extend its boundaries, need not now be determined was not intended to leave any doubt (Texas' br., p. 201) as to the complete invalidity of any State provision, constitutional or statutory, claiming rights in the bed of the adjacent sea. All State provisions involving claims to the resources of the bed of the ocean, whether providing for leasing or other disposition, or whether merely declaratory of claimed rights are null and void.[10]

## CONCLUSION

For the foregoing reasons, in addition to those presented in the main brief for the United States, it is respectfully submitted that the motion for judgment should be granted.

PHILIP B. PERLMAN,
*Solicitor General.*

MARCH 1950.

[10] Of course, the same is true of the Louisiana statutes.

U. S. GOVERNMENT PRINTING OFFICE 1950

# In the Supreme Court of the United States

OCTOBER TERM, 1950

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NO. 13, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF TEXAS

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## DECREE PROPOSED BY THE UNITED STATES

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This cause came on to be heard on the motion for judgment filed by the plaintiff and was argued by counsel.

For the purpose of carrying into effect the conclusions of this Court as stated in its opinion announced June 5, 1950, it is ORDERED, ADJUDGED, AND DECREED as follows:

1. The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of Texas, and outside of the inland waters, extending seaward to the outer edge of the continental shelf and bounded on the east and southwest, respectively, by the eastern boundary of the State of Texas

and the boundary between the United States and Mexico. The State of Texas has no title thereto or property interest therein.

2. The State of Texas, its privies, assigns, lessees, and other persons claiming under it, are hereby enjoined from carrying on any activities upon or in the submerged area described in paragraph 1 hereof for the purpose of taking or removing therefrom any petroleum, gas, or other valuable mineral products, and from taking or removing therefrom any petroleum, gas, or other valuable mineral products, except under authorization first obtained from the United States. On appropriate showing, the United States may obtain the other injunctive relief prayed for in the complaint.

3. The United States is entitled to a true, full, and accurate accounting from the State of Texas of all or any part of the sums of money derived by the State from the area described in paragraph 1 hereof subsequent to June 23, 1947, which are properly owing to the United States under the opinion entered in this case on June 5, 1950, this decree, and the applicable principles of law.

4. Jurisdiction is reserved by this Court to enter such further orders and to issue such writs as may from time to time be deemed advisable or necessary to give full force and effect to this decree.

# In the Supreme Court of the United States

OCTOBER TERM, 1950

---

No. 13, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF TEXAS

---

## MEMORANDUM IN SUPPORT OF PROPOSED DECREE

---

In its opinion of June 5, 1950, in this case (339 U. S. 707), the Court held that the "motion of the United States for judgment is granted." 339 U. S., at 720. The Motion for Judgment filed by the United States in November 1949 had moved "for judgment as prayed in the Complaint * * *." In its opinion, the Court concluded that "the parties, or either of them, may before September 15, 1950, submit the form of decree to carry this opinion into effect." 339 U. S., at 720. It is pursuant to that permission that the decree above set out is proposed by the United States.[1]

[1] Except for the description of the area involved, the proposed decree in this case is identical with that proposed in *United States* v. *Louisiana*, No. 12, Original.

The relief prayed for in the complaint filed by the United States (p. 9)[2] was "that a decree be entered adjudging and declaring the rights of the United States as against the State of Texas in the area herein described, enjoining the State of Texas and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States, and requiring the State of Texas to account to the United States for all sums of money derived by it from the area herein described subsequent to June 23, 1947."

1. Paragraph 1 of the proposed decree embodies the declaration of rights sought by the United States, and is in the same form as paragraph 1 of the decree entered in *United States* v. *California*, 332 U. S. 804, 805, modified to describe the area set out in paragraph II of the complaint herein.

As was the case in the *California* proceeding, this declaration of rights is general in terms. See 332 U. S. 19, 26, 805. We have always construed the similar declaration in the *California* case, and we construe the present one, as determining that the United States has full *dominium* and *imperium* in and over the described submerged area as against the State (see 339 U. S., at 717–719); that, as against the State, the United States has exclusive power and right with respect to the use,

[2] A copy of the complaint filed in this case is attached as an Appendix, *infra*, pp. 9–12.

disposition, management, and control of the described submerged area and its resources (see 339 U. S., at 719); and that the United States is possessed of whatever is the most accurate description of the full power and right to take and enjoy the complete benefit of the mineral and other resources of the bed of the sea—whether that description be characterized as fee-title, ownership, proprietorship, or paramount rights and full dominion.

Unlike Louisiana, the coast of Texas is relatively straight, contains few indentations, and presents very few, if any, problems in marking off the marginal belt from the inland waters. In the view of the United States, there is no present necessity to determine with greater definiteness any particular segments of the boundary of the area claimed by the United States, and the United States does not now propose to file a petition for a supplemental decree, such as was done in the case of *California*, and as we propose to do in *Louisiana's* case upon entry of the decree. All of the existing oil and gas wells bottomed in the subsoil of the marginal sea are readily identifiable, and are plainly beyond any lands owned by the State. There is, therefore, no present need for a precise demarcation between the marginal sea and the landward areas so far as petroleum operations are concerned, and we know of no other reason for further delimitation or identification of

either the federal or the state areas at the present time. If circumstances later require such further action by the Court, the United States will submit appropriate petitions for supplemental decrees.

2. Paragraph 2 of the proposed decree enjoins the State, and those claiming under it, from carrying on any activities in the described area, relating to the exploration, development, and production of oil, gas, or other mineral products of value, unless prior authorization has been obtained from the United States. The need for such injunctive relief is clear on the face of the pleadings. Paragraph V of the complaint asserts that the State has made leases to various persons and corporations which have entered upon the described area, have drilled wells for the recovery of petroleum, gas and other hydrocarbon substances, and have been producing quantities of such materials. Texas's amended answer, in its paragraph V, admits that it has executed leases for oil and gas development in the described area, that the lessees have entered upon the area and have drilled wells, some of which have been producing petroleum substances which the lessees have recovered, paying the State royalties thereon.

Injunctive relief against other types of trespasses is not sought at this time because no facts now known to the Government give rise to a present necessity for injunctive relief in any situa-

tions except those involving oil, gas, and other mineral substances of value. The proposed decree makes clear, however, that the United States is entitled to such other injunctive relief, upon a proper showing, and as circumstances may require.

3. Paragraph 3 declares that the United States is entitled to a proper accounting for the monies derived by the State from the described area since June 23, 1947. That date, which appears in the prayer for relief in the complaint (*supra*, p. 4, *infra*, pp. 11-12), is the date of this Court's decision in *United States* v. *California*, 332 U. S. 19; it was chosen because, in the Government's view, the Court's opinion gave adequate notice of the rights and powers of the United States in the submerged coastal lands, and certainly gave fair warning to any State that its right to collect monies derived from that area was, at best, highly doubtful.

The proposed decree refrains from directing or requiring an actual accounting and payment, in order to give the parties an opportunity to agree between themselves as to the sums owing by the State of Texas. If such an agreement cannot be reached in a reasonable time, the United States anticipates petitioning the Court for a further order relating to the ascertainment of the sums for which the State is accountable to the United States. It is, of course, not uncommon, in patent

infringenent and many other types of cases; for the initial judgment or decree merely to declare the plaintiff's rights and the defendant's liability, leaving the actual amount of the recovery for later determination. Cf. Rule 39 of the Court of Claims.

4. Paragraph 4, which is in the same form as paragraph 3 of the *California* decree (332 U. S. 805), reserves jurisdiction to the Court to enter such further orders and to issue such writs as may be advisable or necessary. This reservation of jurisdiction is especially appropriate because of the possibility, if not the likelihood, that further action by the Court may be required with respect to the accounting or to additional injunctive relief.

It is respectfully submitted that the decree proposed by the United States be entered by this Court as soon as may be practicable.

PHILIP B. PERLMAN,
*Solicitor General.*

SEPTEMBER 1950.

# APPENDIX

# In the Supreme Court of the United States

OCTOBER TERM, 1948

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No. 14, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF TEXAS

---

## COMPLAINT

The United States of America, by its Attorney General and its Solicitor General, brings this suit against the defendant, the State of Texas, and for its cause of action states:

### I

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States.

### II

At all times herein material, plaintiff was and now is the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of Texas and

outside of the inland waters, extending seaward to the outer edge of the continental shelf and bounded on the east and southwest, respectively, by the eastern boundary of the State of Texas and the boundary between the United States and Mexico.

III

The State of Texas claims some right, title or interest in said lands, minerals and other things adverse to the United States.

IV

In the exercise of the rights claimed by it, the State of Texas has, by general law, Act of July 23, 1919 (General Laws, 2d Called Session, 1919, page 51), as amended, authorized the leasing of lands underlying the Gulf of Mexico for the exploitation of petroleum, gas and other mineral deposits in the area herein described.

V

Pursuant to that law, the State of Texas has negotiated and executed such leases with various persons and corporations, and those persons and corporations have, in violation of the rights of the United States, paid to the State substantial sums of money, entered upon said lands and drilled wells for the recovery of petroleum, gas and other hydrocarbon substances. Such wells have been producing quantities of petroleum, gas and other hydrocarbon substances which the lessees of the State have taken and converted to their own uses and for which the lessees have paid to the State substantial sums of money in bonuses,

rents and royalties reserved under the leases, but neither the State nor its lessees have recognized the rights of the United States nor have they paid to the United States either the value of the petroleum and other things taken from the area, or any royalties thereon.

## VI

The State of Texas has no title to or interest in any of the lands in the area herein described, but possesses only those governmental powers which it has with respect to other lands of the United States within the lawful territorial jurisdiction of the State.

## VII

The State has frequently and publicly denied the rights and powers of the United States in the area herein described and has claimed full and complete ownership of the area for itself and, unless the rights of the United States are established and declared by this Court, the State will continue to claim such ownership for itself and to exercise the rights incident to such ownership through its officers, agents, and employees, and will continue to aid, abet and encourage others, as its lessees, to trespass upon and to take and use the minerals and other things of value in the area, in violation of the rights of the United States, from which the United States will suffer irreparable injury, and for which it has no adequate remedy except by this action.

Wherefore, plaintiff prays that a decree be entered adjudging and declaring the rights of the

United States as against the State of Texas in the area herein described, enjoining the State of Texas and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States, and requiring the State of Texas to account to the United States for all sums of money derived by it from the area herein described subsequent to June 23, 1947.

TOM C. CLARK,
*Attorney General.*

PHILIP B. PERLMAN,
*Solicitor General.*

DECEMBER 1948.

# In the Supreme Court of the United States

OCTOBER TERM, 1950

---

No. 13, Original

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF TEXAS

---

## MEMORANDUM IN REGARD TO THE STATE'S OBJECTIONS TO THE DECREE PROPOSED BY THE UNITED STATES

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This memorandum is in response to the State's objections to the decree proposed by the United States and to the memorandum filed in support of those objections.

### I

There is plainly no merit to Texas' claim that an injunction should not issue until there has been a further particularization or elaboration of the area described in paragraph 1 of the proposed decree (Objections, pp. 1, 3–6). The proposed injunctive paragraph deals solely with oil, gas, and mineral operations seaward of the low-water mark and outside of inland waters; and it is not,

and cannot be controverted that at the present time all offshore oil, gas, and mineral operations—including in the term "operations" all existing oil and gas wells (whether or not now producing), and also whatever drilling operations, maintenance of equipment, or other development there may now be—are plainly identifiable as indisputably on one side of the boundary or the other. The Texas coast is relatively straight and there is no room for disagreement as to any of the offshore points at which such operations are now being carried on. The State's main brief itself shows that the only wells producing oil at the time of the argument in March 1950, which would be affected by the injunction, are clearly bottomed in the subsoil of the marginal sea and are seaward of the ordinary low-water mark. See Texas' Main Brief, p. 12, and the "Diagramatic Cross Section of Caplen Field, Texas", opposite p. 12. All of the other existing offshore oil and gas wells (not now producing) and the other developmental activities, which could conceivably be affected by the injunction, are even more clearly seaward of the boundary. Texas' Objections do not dispute this fact or suggest the contrary.[1]

The real burden of the State's argument is that unspecified *future* operations under present or

[1] In the *California* case, on the other hand, there was an active and *bona fide* dispute between the State and the United States as to the status of every well or operation claimed by the United States to be seaward of the boundary set forth in paragraph 1 of the Court's decree in that case.

future state leases *might* involve areas which are not so clearly defined as the areas involved in present operations, and that, therefore, no injunction should now issue, even as to the clearly defined and indisputable areas of present operation, until the Court has delineated and marked the boundary all along the coast. The conclusive answer is that if such future operations do eventuate, and a real problem of demarcation or identification does arise—an event which the configuration of the Texas coast makes unlikely [2]—the State or the United States or the Court *sua sponte* can then initiate supplementary proceedings for a more detailed demarcation of the boundary at the particular spot, and, if there be need, the injunction can meanwhile be modified, augmented, or suspended. Present injunctive relief to which the United States is entitled should not be denied because of the hazard that future circumstances may possibly call for change in the terms or specificity of the injunction.

[2] There also is little likelihood of any dispute over the meaning of "ordinary low-water mark." Like the related concept of ordinary high-water mark, the ordinary low-water mark is not a "physical mark made on the ground by the waters," but is the line of ordinary low water "as determined by the course of the tides." Cf. *Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10, 22. The ascertainment of the ordinary low-water mark, or the point at which the plane of ordinary low water intersects the shore, is an engineering process which can be performed, where necessary, by the Coast and Geodetic Survey or some similarly qualified organization. See Marmer, H. A., *Tidal Datum Planes* (U. S. C. & G. S., Special Publication No. 135, 1927), pp. 97, *et seq.*

In this connection, it may help to remove a possible misunderstanding of the position of the United States on the boundary to point out explicitly that we agree with Texas (Objections, p. 4) that the "low-water mark for measuring the marginal sea" is on the seaward side of the line of coastal islands, consisting, in greatest part, of Padre Island, Mustang Island, St. Joseph Island, Matagorda Island, Matagorda Peninsula, Galveston Island, and Bolivar Peninsula. There is no controversy on that point.

## II

The United States has no intention of stopping the production of oil from existing wells, and the proposed injunction would not have that effect (Texas' Objections, pp. 1, 6, 10–13).[3] The proposed paragraph 2 enjoins oil and gas operations only if authorization is not first obtained from the United States, and the Secretary of the Interior stands ready, on behalf of the United

[3] With respect to the State's emphasis on the supposed harm which will allegedly follow upon an injunction, it is pertinent to recall that in *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237–9, the Court pointed out that in a suit such as this by a sovereign or quasi-sovereign the "court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power," and added that "Whether Georgia by insisting upon this claim is doing more harm than good to her own citizens is for her to determine."

States, to authorize continued production from existing wells on proper terms and conditions.[4]

Though Texas denies authority in the Federal Government to take such steps without further legislation, it is difficult to see what right the State has to raise that issue in the face of the Federal Government's assertion, which we now reiterate,[5] that it has such authority and is prepared to exercise it. The Secretary of the Interior has full power to make interim arrangements to protect and preserve the lands and resources adjudged to the United States from injury, deterioration, seepage, drainage, or other harm.[6] This power includes authority to permit continued production, on appropriate terms, from existing wells. Cf. Executive Order No. 9633, 3 C. F. R., 1945 Supp., p. 123; 5 U. S. C. 485 (12); 40 Op. Atty. Gen. 41. If the United States asserts its willingness to make such arrangements, as it does, the State of Texas can-

[4] We are informed that at the present time there is no production of oil or gas from wells which would be affected by the injunction.

[5] See statement of Attorney General Tom C. Clark before Joint Hearings of the Committee on the Judiciary, considering S. 1988 and similar House bills, 80th Congress, Second Session, March 2–3, 1948, pp. 612, 679, and also statement of Mastin White, Solicitor of the Department of the Interior, at the Hearings before the Senate Committee on Interior and Insular Affairs on S. J. Res. 195, 81st Congress, Second Session, August 14–19, 1950, at p. 31.

[6] The State itself points out the loss and detriment which would follow upon stoppage of existing production (Objections, p. 12).

have no standing or interest, in the present suit, to deny its power to do so.

## III

The fact that the lessees are not parties to this suit (Objections, pp. 1, 6–10) does not bar their being named in the injunctive paragraph of the decree. This is not a conventional real property action between private claimants, but a controversy between the United States and one of its constituent States over the boundary between their respective spheres. For over a century it has been settled that in original suits of this type between sovereigns or quasi-sovereigns—as in the comparable case of a suit over water rights in interstate streams—the parties represent their citizens, grantees, and those who claim under them, and the latter are bound by the decree, and their private rights are necessarily determined and affected by this Court's decision, whether or not they have been parties.[1] *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 106–108; *Poole* v. *Fleeger*, 11 Pet. 185, 209; *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 725, 748; *Wyoming* v. *Colorado*, 286 U. S. 494, 508–9; *Nebraska* v. *Wyoming*, 325 U. S. 589, 627; see also *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 355–6; *Georgia* v. *Tennessee Copper Co.*,

[1] No lessee has sought to intervene or become a party to the suit.

206 U. S. 230, 237, and the other cases cited in *Wyoming* v. *Colorado, supra,* p. 509, fn. 5.

A notable example of a suit between sovereign litigants in which the rights of persons not parties to the proceeding were foreclosed by the decree is the case of *Louisiana* v. *Mississippi,* 202 U. S. 1. That suit involved a dispute over the location of the boundary between the States where it traverses the inland waters of Lake Borgne and the Mississippi Sound, but the controversy was precipitated by the efforts of the respective States to regulate and issue permits for the dredging of oysters from submerged lands in the disputed area. In the decree entered in that case, this Court adjudged the boundary to be that determined in its opinion and included in its decree the following injunctive relief (202 U. S. 58–59):

> It is further ordered, adjudged and decreed that the State of Mississippi, its officers, agents and *citizens,* be and they are hereby enjoined and restrained from disputing the sovereignty and ownership of the State of Louisiana in the land and water territory south and west of said boundary line as laid down on the foregoing map. [Emphasis supplied.]

Another instance of injunctive relief of this character is to be found in the case of *Wisconsin* v. *Illinois,* the celebrated interstate controversy involving the operation of the Chicago Drainage Canal. In the decree entered in that case on

April 21, 1930, 281 U. S. 696, there appears the following:

> * * * the defendants, the State of Illinois and the Sanitary District of Chicago, their employees and agents, and *all persons assuming to act under the authority of either of them,* be and they hereby are enjoined from diverting any of the waters of the Great Lakes-St. Lawrence system or watershed through the Chicago Drainage Canal and its auxiliary channels * * *. [Emphasis supplied.]

And in *New Jersey* v. *Delaware,* 291 U. S. 361, a boundary proceeding, the decree entered by the Court contains the following (295 U. S. 694, 698–699):

> The State of Delaware, its officers, agents and representatives, *its citizens and all other persons,* are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of the State of New Jersey over the territory adjudged to the State of New Jersey by this decree; and the State of New Jersey, its officers, agents and representatives, *its citizens and all other persons* are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of the State of Delaware over the territory adjudged to the State of Delaware by this decree. [Emphasis supplied.]

It is clear from these cases that injunctive relief may be granted in suits between sovereigns

and may be made effective against persons deriving the rights from one of the sovereign litigants, even when those persons are not joined as parties to the litigation. On principle, the result should be the same. Since the lessees have been represented by the State, are bound by the declaration of rights to be entered, and their rights in the designated area are conclusively determined, there is no reason why the injunction should not run against them. Even in private equity cases, an injunction may properly be issued against persons represented by the defendant (*Scott* v. *Donald*, 165 U. S. 107, 117) and those who are its associates or confederates in performing the prohibited acts (*Chase National Bank* v. *Norwalk*, 291 U. S. 431, 436–7). The oil companies which are the State's lessees fall within both of these classes.

Moreover, in original suits of this character between sovereigns, in which multiplication of parties is highly undesirable and the public nature of the controversy is dominant, there is a special reason for departing from the rules as to persons against whom relief may be granted which may be thought to govern in private controversies. Adequate relief to the prevailing sovereign should not be refused because it is necessary to cover persons through whom the defending sovereign acts and whose interests it purports to serve, but who have properly not been made parties. In thus allowing the public nature of the controversy to control the relief, there is little likelihood that

the lessees will be harmed because they have not been made parties. Their general interests in the disputed area have been, and are being, represented by the State. It is very doubtful whether there exist any unique or peculiar circumstances tending to show that relief should not be granted against a particular lessee, but, if there be such substantial reasons, the individual case can be dealt with administratively under the Federal Government's power to authorize operations seaward of the boundary, or, perhaps, by special judicial petition or proceeding.

IV

A. As pointed out in our Memorandum in Support of the Proposed Decree (pp. 3–4, 7), the date June 23, 1947, appears in the complaint's prayer for relief with reference to the prayed-for accounting—the prayer for relief which the Court has adjudged should be granted—and was chosen because the Court's *California* opinion gave adequate warning of the rights and powers of the United States in the submerged coastal lands off Texas, as well as off the other States. This Court's opinion of June 5, 1950 (339 U. S. 707) is largely grounded in the *California* opinion, and there is no inequity in requiring the State to account for moneys received since the date of the earlier decision.[8]

[8] Texas makes much of the fact that the United States "waited a year and a half after the *California* decision to bring suit against Texas" (Objections, pp. 17–18), as indi-

As for the State's alternative argument—that "if the date from which the accounting is to begin is not the date of the Court's opinion in this case, in no event should it be prior to May 16, 1949, the date of the filing of the complaint herein" (Objections, pp. 19-23)—it seems enough, for present purposes, to point out that the United States actually filed its motion for leave to file the complaint on December 21, 1948, and that May 16, 1949, is the date of this Court's order granting that motion (337 U. S. 902), after several months of delay due to the State's strenuous opposition to the filing of the complaint.

B. We do not agree that the addition to paragraph 3 proposed by the State at p. 24 of its Objections is necessary or desirable. Paragraph 4 of the proposed decree affords full authority for the Court to take such action as it deems proper should the parties fail to agree upon the accounting within a reasonable time. See the United States' Memorandum in Support of the Proposed Decree, pp. 7, 8. In our view, it would be undesirable to set a definite time limit, or to anticipate the mechanism for resolving disputed issues which may arise under the accounting

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cating the extent of the Federal Government's uncertainty about the application of the California decision to Texas' special case, but it fails to note that the suit against Louisiana—admittedly not a special case—was begun on the same day, December 21, 1948.

paragraph of the decree; the nature and scope of those disputed issues cannot now be known.

## CONCLUSION

The objections made by the State to the proposed decree are not sound in any respect.

Respectfully submitted.

PHILIP B. PERLMAN,
*Solicitor General.*

NOVEMBER 1950.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948

[redacted]13

No. ——, Original

UNITED STATES OF AMERICA,

Plaintiff

*vs.*

STATE OF TEXAS,

Defendant

## MOTION FOR LEAVE TO FILE OBJECTIONS AND OBJECTIONS TO MOTION OF UNITED STATES OF AMERICA FOR LEAVE TO FILE COMPLAINT

PRICE DANIEL
Attorney General of Texas

JESSE P. LUTON, JR.
Assistant Attorney General

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The Attorney General of the United States seeks to invade the power of Congress and has no authority to bring this suit because the Congress has not in the first instance asserted the rights herein alleged against the State of Texas.

SECOND OBJECTION ..... 5

The interests of convenience, efficiency and justice will be better served by full development of the evidence in a district court, with customary appeal, than before a master in an original proceeding.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948

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No. ——, Original

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UNITED STATES OF AMERICA,

Plaintiff

*vs.*

STATE OF TEXAS,

Defendant

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## MOTION FOR LEAVE TO FILE OBJECTIONS

The State of Texas, by its Attorney General, asks leave of the Court to file its objections to the motion filed herein by the United States of America for leave of this Court to file its complaint against the State of Texas submitted therewith.

PRICE DANIEL
Attorney General of Texas

## FIRST OBJECTION

**The Attorney General of the United States seeks to invade the power of Congress and has no authority to bring this suit because the Congress has not in the first instance asserted the rights herein alleged against the State of Texas.**

*Statement in Support of First Objection*

In the Statement In Support of Motion, page 2, the Attorney General of the United States admits that the land in controversy is within the seaward boundaries of the State of Texas. There is no allegation of original title in the United States. On the contrary, it is admitted (p. 3) and this Court judicially knows that the State of Texas was an independent Republic prior to joining the Union. By the annexation agreement it conveyed no land or proprietary rights to the United States which would support the judgment herein prayed for. *See Joint Resolution of Congress, March 1, 1845, 5 Stat. 797.*

This Court judicially knows that there is no law or other action of Congress interpreting the Texas annexation agreement or asserting title to lands in Texas as is done here by the Attorney General. The State recognizes the Federal governmental powers over these lands to be the same as they are over all other waters and lands within the nation. But in this suit property rights are being asserted in the first instance by the Attorney General without a prior assertion by or authority from the Congress.

How does the Attorney General know the Congress will ever assert any proprietary claim or right which

would support this action? Texas denies that such an assertion by Congress could operate to divest it of title to these lands, but this State should not be put to the expense, trouble and loss of revenues which will result from litigating a claim which the Congress may never assert. Whether title or other proprietary rights ever will be asserted by the United States against the State of Texas to lands within its boundaries is a question for the Congress to decide in the first instance and not the Attorney General.[1]

It is well known to this Court that bills to assert such rights and authorize similar suits twice failed of passage in the Congress.[2] The Court judicially knows that the President in his recent message to the present Congress has proposed legislation on this subject. The Court judicially knows that on the day the Government's Motion for Leave was filed herein, there was pending on the Senate calendar a bill already passed by a 257 to 29 vote in the House confirming state ownership and control of at least a portion of the lands herein sued for.[3] A similar Act passed the Congress in

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[1]Here it is interesting to note that even the President's Proclamation of jurisdiction over the continental shelf (No. 2667, Sept. 28, 1945) did not assert ownership thereof against the State, because the Executive Order issued therewith (E.O. 9633, Sept. 28, 1945) said: "Neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit."

[2]S. J. Res. 208, 75th Cong., 1st Sess. (1938); S. J. Res. 83 and 92, 76th Cong., 1st Sess. (1939).

[3]H. R. 5992, 80th Cong., 2d Sess. (1948); 94 Cong. Rec. 5281 (1948), same as S. 1988, 80th Cong.

1946 but was vetoed by the President.[4]

Several bills now are pending in the 81st Congress, some asserting Federal rights and others recognizing State rights in the property which is the subject of this suit. Until and unless the Congress makes some assertion on behalf of the United States of the rights herein sued for, it is respectfully urged that the Attorney General is invading the province of the Congress and is without authority to bring this action.

That this Court cannot give full and final relief in this case or settle all the equities which may arise without Congressional action was recognized by the Attorney General of the United States in the *California* case. There he advised this Court that if judgment were for the Government, the President would recommend Congressional action which would care for "any equities of the State and those who have operated under it."[5] The same is true of his Memorandum in Support of Judgment (p. 5) in that case, in which it was asked that injunctive relief be withheld until it could be "attuned to anticipated Congressional action."

Even if the Court should not fully agree with us on this point, it is urged that this objection would justify the Court in using its discretion by awaiting action of Congress in this political field before permitting the Attorney General to file this suit as an original action in this Court.

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[4]H. J. Res. 225, 79th Cong., 2d Sess. (1946); 92 Cong. Rec. 9642, 10316 (1946).

[5]Plaintiff's Supplemental Brief, pp. 5-6, U. S. v. California, No. 12, Original, October Term, 1945.

## SECOND OBJECTION

**The interests of convenience, efficiency and justice will be better served by full development of the evidence in a district court, with customary appeal, than before a master in an original proceeding.**

*Statement in Support of Second Objection*

Although this Court has original jurisdiction of "All controversies between the United States and a State," its jurisdiction is not exclusive in such cases. 28 U.S.C. §1251(b). The district courts have concurrent jurisdiction with this Court in cases such as the present one, those courts having "original jurisdiction of all civil actions, suits or proceedings commenced by the United States. . . ." 28 U.S.C. §1345. *United States v. California,* 297 U.S. 175, 187; *United States v. 4,450.72 Acres of Land, Clearwater County, State of Minnesota,* 27 F. Supp. 167, affirmed 125 F. (2d) 636; *United States v. Ladley,* 51 F. (2d) 756.

The exercise of original jurisdiction by this Court in cases covered by Article III, Section 2, Clause 2 of the Constitution of the United States "is not mandatory in every case," and the "Court in its discretion has withheld the exercise of its jurisdiction where there has been no want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency and justice." *State of Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 464.

The issues tendered by the bill of complaint present questions which a district court is fully competent to decide.

Contrary to the situation in a similar proceeding against the State of California in which neither party "suggested any necessity for the introduction of evidence,"[6] the State of Texas in this case will suggest the necessity and ask for the right to develop the evidence fully.

In this proceeding the Government already has admitted that the State of Texas entered the Union under circumstances different from those under which California was admitted.[7] In the event of trial Texas will offer a great amount of testimony and written documents supporting its ownership of these lands and minerals by the independent Republic of Texas under Spanish and Mexican Law; its defense and maintenance of its boundaries and ownership for nearly 10 years by the Texas Navy; recognition by the United States and other major nations of the world; and the circumstances leading to the final agreement of annexation by which Texas retained all property within its boundaries not specifically conveyed to the United States. Texas will seek to develop fully the many instances in which this interpretation of the annexation agreement has been made by the United States, and that the filing of this suit is the first time since annexation in 1845 that any official of the United States has placed a different interpretation on the annexation agreement with Texas.

The evidence, documentary and otherwise, can be brought more easily before a proper Federal district court, such court being in proximity to the witnesses and documents. Also, the general rule in our system

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[6] U. S. v. California, 332 U. S. 19, 24.

[7] Government's Motion for Leave to File, p. 3.

of jurisprudence that title suits should be tried in Federal or State courts within the State where the land is located is particularly applicable in this case. Federal and State courts within Texas are already familiar with the law of real property and rules of evidence applicable to the case. This is especially true of Texas since its titles at the time of annexation were based upon Spanish and Mexican law and were specifically preserved as they then existed by the annexation agreement and Texas Constitution approved by the United States Congress.*

For these reasons, it is urged that a Federal district court can handle this case and develop the facts more conveniently than could this Court through appointment of a master. The final decision would remain in this Court through proper appeal. We are supported in this view by the dissenting opinion (and the distinguishing reaction thereto by the majority) of Chief Justice Stone, in which he was joined by Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Justice Jackson, in *State of Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 470. There it was said:

> ". . . In an orginal suit even when the case is first referred to a master, this Court has the duty of making an independent examination of the evidence, a time consuming process which seriously interferes with the discharge of our ever increasing appellate duties. No reason appears why the present suit may not be as conveniently proceeded with in the district court of the proper venue as in this Court, or why the convenience of the parties and witnesses, as well as of the courts concerned, would be better served by a trial before a master appointed by this Court than by a trial in

*5 Stat. 797; Art. VII, Sec. 20, Const. of Texas, 1845.

> the appropriate district court with the customary appellate review. The case seems preeminently one where this Court may and should, in the exercise of its discretion and in the interest of a more efficient administration of justice, decline to exercise its jurisdiction, and remit the parties to the appropriate district court for a proper disposition of the case there."

The only apparent reason why the Court declined to remit the parties to a district court in that case is that it was not clear that all of the defendants could be found in one judicial district, which reason does not exist in this case. But for this reason the majority of the Court indicated that such procedure as is here requested "would be wholly appropriate."

As said by this Court, in an opinion by Mr. Justice Jackson, in *Kennedy v. Silas Mason Co.*, 334 U. S. 249:

> "The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine."

No reason appears why the present suit may not conveniently proceed in the district court of the proper venue or why the convenience of the parties, as well as of the courts, would be better served by a trial before a master appointed by this Court than by a trial in a district court with the customary appellate review.

Without waiving the objection based upon lack of authority of the Attorney General, it is believed that

if a suit is filed at all, the interests of convenience, efficiency and justice will be better served by this Court's denial of the motion of the United States of America for leave to file its complaint against the State of Texas, without prejudice to the maintenance of the suit in an appropriate district court.

## CONCLUSION

It is respectfully submitted that the motion for leave to file the complaint should be denied.

PRICE DANIEL
Attorney General of Texas

JESSE P. LUTON, JR.
Assistant Attorney General

January 14, 1949

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1948

No. [redacted]13, Original

UNITED STATES OF AMERICA,
Plaintiff

vs.

STATE OF TEXAS,
Defendant

SUPPLEMENT TO MOTION FOR LEAVE TO FILE OBJECTIONS AND OBJECTIONS TO MOTION OF UNITED STATES OF AMERICA FOR LEAVE TO FILE COMPLAINT.

Supplementing the objections to motion of the United States for leave to file complaint heretofore filed, and as a part thereof, the State of Texas respectfully requests in the event the motion of the United States for leave to file the original complaint is not denied without further hearing, that a rule to show cause issue in order that the State of Texas may file a more comprehensive brief and be given the privilege of making oral argument. Whether or not a rule to show cause is issued as herein prayed, it is requested that the motion of the United States for leave to file complaint be set down for oral argument.

PRICE DANIEL
Attorney General of Texas

January 27, 1949

Office - Supreme Court, U. S.
FILED
MAY 4 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948

[redacted]13

No. ——, Original

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UNITED STATES OF AMERICA,

Plaintiff

*v.*

STATE OF TEXAS,

Defendant

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## SUPPLEMENTAL STATEMENT AND BRIEF FOR THE STATE OF TEXAS IN SUPPORT OF OBJECTIONS TO MOTION OF THE UNITED STATES FOR LEAVE TO FILE COMPLAINT

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PRICE DANIEL
Attorney General of Texas

J. CHRYS DOUGHERTY
Assistant Attorney General

JESSE P. LUTON, JR.
Assistant Attorney General

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948

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No. ——, Original

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UNITED STATES OF AMERICA,

Plaintiff

*v.*

STATE OF TEXAS,

Defendant

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## PRELIMINARY STATEMENT

The State of Texas appears here only for the purpose of objecting to the motion of the United States for leave to file the Complaint. In so doing the State does not now tender any issue on the merits of the controversy.

However, in view of the Attorney General's statement that the basic issues raised by the Complaint can be determined "as they were in the comparable case of *United States v. California*,"[1] it must be pointed out immediately that in the event of trial the State of Texas will interpose special defenses not available to nor presented by California and therefore not decided in the case expressly relied upon by the United States

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[1]Supplemental Memorandum in Support of Motion, p. 2; Brief in Support of Motion, p. 8.

as a precedent for this action. That Texas has special equities was responsibly and repeatedly acknowledged by the Attorney General of the United States in his testimony before congressional committees in 1948. He then testified, moreover, that on the day on which he argued the *California* case in this Court, March 13, 1947, he handed to the press a written statement to the effect that Texas owned and retained all the lands within its boundaries, including the marginal sea area.[1]

Texas also rejects the suggestion made by the Government that the issues may be determined without "the taking of testimony or presentation of evidence." The differences already indicated, together with others equally pertinent, would require the exercise of Texas' constitutional right to "present evidence" and fully

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[1] United States v. California, 332 U.S. 19 (1947).

[2] Joint Hearings Before the Committees on the Judiciary, 80th Cong., 2d Sess., on S. 1988 and Similar House Bills, February-March, 1948, 616, 617, 635, 689, 690.

[3] Ibid., 689. The statement read: "Attorney General Clark today, in answer to inquiries regarding his Supreme Court appearance on behalf of the United States in the famous tidelands case emphasized the fact that the case involves only the area off the coast of California.

* * *

"Whatever the decision of the Court may be in the California case it would not be decisive as to the rights of any other State. . . . Other coastal States are on an entirely different footing.

"When asked regarding his native State of Texas, the Attorney General pointed out that Texas had been an independent nation, a republic, for 10 years before joining the Union. As a republic it owned all of the lands within the boundaries, including the marginal sea commonly called tidelands. This area similar to that involved in the California case extended into the Gulf of Mexico and was under the sovereignty of Texas during the Republic and was retained by it under the provisions of the Act of Admission."

[4] Loc. cit. note 1 supra.

[5] Cf. Baltimore & O. Ry. v. United States, 298 U.S. 349, 369 (1936); Oregon Ry. & Nav. Co. v. Fairchild, 224 U.S. 510, 525 (1912).

develop its case, as distinguished from the *California* case, where neither party suggested "any necessity for the introduction of evidence."

Since this is a preliminary proceeding, we mention the existence of these defenses and the necessity of presenting evidence in their support only for the purpose of challenging the Government's attempt to prejudge the issues which may be presented on the merits and how they should be tried.

The United States points out that "the State of Texas does not suggest the absence of a case or controversy . . . , nor does it question the right of the United States to seek a resolution of this controversy through judicial proceedings. . . ." In this connection, the State of Texas wishes it clearly understood that in the event of trial it intends to urge both of these objections on grounds different from those presented in the *California* case. Their validity would more clearly appear after the issues have been joined and material facts developed. In refraining from raising them at this time, Texas does not waive these objections to the Court's jurisdiction.

The State of Louisiana has fully developed an objection based on immunity of the State from suit without its consent. While Texas has not asked the Court to re-examine its former decision in *United States v. Texas*, 143 U.S. 621 (1892), on this point, it agrees as an original proposition with the contention made by Louisiana. It does not consent to be sued and suggests the absence of such consent if the Court reconsiders this question in the *Louisiana* case.[3]

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[1] 332 U.S. at 24.

[2] Brief in Support of Motion, p. 2.

[3] United States v. Louisiana, No. ——, Original, October Term, 1948.

## FIRST OBJECTION

*(Restated)*

**Since the Complaint presents questions of national policy now pending in Congress, heretofore undetermined by it and beyond the authority of the Attorney General to determine in the first instance, the Court should not grant leave to file at this time.**

*Scope of the Objection*

Our original statement of "First Objection" was as follows:

> "The Attorney General of the United States seeks to invade the power of Congress and has no authority to bring this suit, because the Congress has not in the first instance asserted the rights herein alleged against the State of Texas."

The Attorney General and Solicitor General interpreted this as an objection questioning merely the authority of the Attorney General to bring the suit, a point which was "disposed of in *United States v. California*, 332 U.S. 19."[2] In addition, as shown by our Statement thereunder,[3] this objection was intended to and does suggest that the Complaint presents a question of national policy undecided by Congress and wholly beyond the power of the Attorney General to decide in the first instance.

In our Statement in support of this objection (p. 4) we said:

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[2] Brief in Support of Motion, p. 2.

[3] Objections to Motion for Leave to File Complaint, pp. 3-4.

> "Even if the Court should not fully agree with us on this point, it is urged that this objection would justify the Court in using its discretion by awaiting action of Congress in this political field before permitting the Attorney General to file this suit as an original action in this Court."

Because adequate development of the other matters relating to jurisdiction originally presented in this objection would involve certain phases of the merits not now before the Court, we have by restatement limited our first objection to the compelling reasons for the Court's abstention while Congress is exercising its jurisdiction over the subject matter. It is to this point, addressed solely to the Court's discretion, that we direct this additional statement.

*The Complaint Presents a Question of National Policy*

In examining the Complaint this Court is concerned with its substance and effect and not mere form. *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 259 (1933); *Re Summers*, 325 U.S. 561, 567 (1945); *Indianapolis v. Chase National Bank*, 314 U.S. 63, 69 (1941); *Cuyahoga River Power Co. v. Northern Ohio T. & L. Co.*, 252 U.S. 388, 397 (1920). In looking to the substance the Court may and should consider not only the Complaint but the attached Statement in Support of Motion and admissions made there and in the plaintiff's brief, in so far as they relate to the question of jurisdiction.[12]

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[12] Cf. Gibbs v. Buck, 307 U.S. 66, 71, 72 (1939); Land v. Dollar, 330 U.S. 731, 735 (1947); KVOS, Inc. v. Associated Press, 299 U.S. 269, 278 (1936); Turmine v. West Jersey and Seashore Ry., 41 F. 2d 614 (E.D. Pa. 1930).

The Complaint, "attached Statement" and brief, show that the United States is relying solely upon the *California* case as defining the basis, nature, and extent of its claims in the present bill.[9] Therefore, by plaintiff's admission and at its own suggestion the *California* case may be looked to in construing the Complaint.

A bill in equity, it prays (Par. VII, p. 9) that:

> ". . . a decree be entered adjudging and declaring the rights of the United States as against the State of Texas in the area herein described, enjoining the State of Texas and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States, and requiring the State of Texas to account to the United States for all sums of money derived by it from the area herein described subsequent to June 23, 1947."

Although containing an allegation of fee simple title, it does not pray for the recovery of title. There is no real issue as to the existence of certain Federal paramount governmental powers over the area the same as over all other waters and lands within the nation. The real purpose of the Complaint is to obtain a declaration of superior rights in the Federal Government to determine in the first instance how, and

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[8]The prayer of the Complaint (Motion for Leave to File Complaint, p. 9) shows that the rights claimed by the United States date from June 23, 1947, the date of the decision in United States v. California, 332 U.S. 19 (1947).

[9]Statement in Support of Motion, pp. 2-1.

[10]"The basic issue in this controversy is whether the rule announced by this Court in United States v. California, 332 U.S. 19, is applicable to the lands underlying the Gulf of Mexico adjacent to Texas. The question is essentially one of law and one which, it is believed, can be determined by this Court without the taking of testimony." Brief in Support of Motion, p. 8.

by whom the oil and gas resources of the area shall be leased and developed, and to exclude the State from further exercising such function without authority from Congress. The Court judicially knows that since the *California* decision Congress has not acted on the subject matter, either to authorize Federal leasing or development or to exclude State exercise of such functions.

That decision, its subsequent history, and resulting administrative action have demonstrated that the whole determination of whether Federal or State agencies should be allowed to lease and manage the resources under the navigable waters within their boundaries involves political questions for Congress to decide. Great expense, trouble, and loss of revenues would result from litigating claims which the Attorney General is asserting, but which Congress, in establishing a national policy, may never assert or exercise. Equally important, as hereinafter shown, the public interest would not be served by stopping State operations in the development of these important natural resources pending future action by Congress. This was acknowledged by the Attorney General after the *California* decision when he asked this Court, for the same reason that we are now requesting it to withhold jurisdiction, to hold in abeyance the only positive relief he seeks in the present case. The Attorney General said:

> ". . . As is apparent from the stipulation above referred to, the parties expect legislative action pertinent to the subject-matter of the litigation. This Court has, in the past, deemed it appropriate that injunctive relief be attuned to anticipated Congressional action. *Oregon & Cal. R. R. v. United States*, 238 U.S. 393, 438-439. In the present situation, we think it proper that injunctive relief be withheld until Congress has had a reason-

able opportunity to enact legislation providing for the management, administration and control of those areas which this Court has ruled to be subject to the paramount rights of the United States. . . ."[16]

It will be recalled that in the *California* case this Court said:

> "For Article IV, § 3, Cl. 2, of the Constitution vests in Congress 'Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . .' We have said that the constitutional power of Congress in this respect is without limitation. *United States v. San Francisco*, 310 U.S. 16, 29-30. Thus neither the courts nor the executive agencies could proceed contrary to an Act of Congress in this congressional area of national power."[17]

and again

> "But beyond all this we cannot and do not assume that Congress, which has constitutional control over Government property, will execute its powers in such a way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission."[18]

Mr. Justice Frankfurter in his dissent likewise pointed out that

> "The disposition of the area, the rights to be

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[16] Memorandum in Support of Proposed Decree, United States v. California, No. 12, Original, October Term 1946, pp. 4-5.

[17] 332 U.S. at 27. In United States v. San Francisco, here referred to, the Court added: "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine."

[18] Ibid. at 40.

> created in it, the rights heretofore claimed in it through usage that might be respected though it fall short of prescription, all raise appropriate questions of policy, questions of accommodation, for the determination of which Congress and not this Court is the appropriate agency."

Shortly after this decision, the Secretary of the Interior, the Attorney General of the United States and the Attorney General of California entered into a stipulation under which lessees holding State leases in California's marginal sea were permitted to continue operations and the State was allowed to continue leasing and collection of revenues (impounding the latter in a special fund), pending congressional action or the entry of a final decree. This stipulation set out that in the view of the President "it will be necessary to have congressional action looking toward the future management of the resources of this area" and that he intended "to recommend to the Congress that legislation be enacted recognizing both prospectively and retrospectively, any equities of the State and those who have operated under it, to the fullest extent consistent with the national interest."[20] In transmitting this stipulation to the President the Attorney General wrote

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[19] Ibid. at 45-46.

[20] The stipulation provided in part:

"WHEREAS, the Attorney General in presenting the case of the Government herein to the Supreme Court of the United States made the following statement in oral argument:

> We will recommend to the Congress that legislation be enacted designed to relieve California and those who have operated under State authority, from the necessity of accounting to the United States for revenues derived in the past from the exploitation of any of the lands here involved. Such legislation, in the view of the President, should also establish equitable standards for the recognition of investments made by private interests and should offer a basis for the continued operation of private establishments wherever consistent with the na-

that such arrangement was necessary "to protect the public interest" and "to deal with such problems as could not await Congressional and further judicial action." He said further:

> "The opinion of the Supreme Court last June gave rise to a variety of unusually complex problems. The most pressing of these was the urgent need of assuring continued oil production in the

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tional interest, and on terms which would be fair and just under all circumstances.

"AND WHEREAS the supplemental brief for the United States contained the following representation at pages 5 to 6:

> In this connection it is pertinent to note, as stated by the Attorney General at oral argument, that the President had authorized him to say that there is no desire on the part of the President or of any federal official to destroy or confiscate any honest or bona fide investment, or to deprive the State or its subdivisions of any reasonable expectation of return from the areas that have been developed.
>
> The President recognizes that in the event the decision of this Court is favorable to the United States, it will be necessary to have Congressional action looking toward the future management of the resources of this area. And he also intends to recommend to the Congress that legislation be enacted recognizing both prospectively and retrospectively, any equities of the State and those who have operated under it, to the fullest extent consistent with the national interest.

"* * *

"7. It is understood that the policy of the executive branch of the Government of the United States with respect to proposals for future legislation regarding the subject matter of this litigation, as expressed in the recitals in this stipulation concerning the statements of the Attorney General at the oral argument before the Supreme Court and in the Supplemental Brief for the United States, has not changed, and in fact is intended to be confirmed by this stipulation.

"* * * *

"9. This stipulation shall remain in effect until pertinent legislation is enacted by the Congress; . . ." Appendix B, Memorandum in Support of Proposed Decree, United States v. California, No. 12 Original, October Term, 1946, pp. 12-19.

As the Court judicially knows, operations are continuing under this stipulation and renewal thereof at the present time.

coastal waters off California. Continued oil production was necessary in the interest of the United States. . . ."[21]

On August 8, 1947, the Solicitor of the Department of the Interior ruled that the Mineral Leasing Act of 1920 has no application to coastal submerged lands and that congressional action would be necessary before Federal leases could be granted in the area.[22] This opinion was concurred in by the Attorney General.[23]

After the *California* decision, Attorney General Clark recognized the propriety of deferring further suits against the other coastal States until Congress adopted a national policy: "When Congress decides the national policy we will proceed . . ."[24]

As the Court judicially knows, the efforts of the States to have Congress confirm and establish the title claimed by them to the submerged lands within their respective boundaries increased in intensity.[25] These

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[21] See Appendix A, p. 34.

[22] Opinion M-34985, August 8, 1947, from the Solicitor of the Department of the Interior to the Secretary of the Interior.

[23] Letter opinion from Attorney General Tom C. Clark to the Secretary of the Interior, August 29, 1947.

[24] Press release quoted in Joint Hearings before the Committees on the Judiciary, 80th Cong., 2d Sess., on S. 1988 and Similar House Bills, February-March, 1948, 29. See further statement by the Attorney General concerning this release. Ibid. 692-693.

[25] Congress was petitioned for State ownership and control by such national groups as the Council of State Governments, the Conference of Governors, National Association of Attorneys General, American Bar Association, American Title Association, United States Conference of Mayors, American Association of Port Authorities, National Institute of Municipal Law Officers, National Water Conservation Conference, and the National Reclamation Association. Joint Hearings Before the Committees on the Judiciary, 80th Cong., 2d Sess., on S. 1988 and Similar House Bills, February-March, 1948, pp. 36, 35, 1046, 179, 483, 1467, 884, 1696, 1459 and 1460.

efforts culminated in hearings lasting 19 days in the Second Session of the 80th Congress on 32 bills establishing State titles (subject to the same character of paramount rights in the Federal Government as presently exist over other navigable waters) and on four Government-sponsored bills providing machinery for Federal management of the area.[25] As a result both House and Senate Judiciary Committees favorably reported bills confirming and establishing State title, use and control of the submerged lands within original State boundaries subject to the above mentioned Federal paramount rights,[26] and the House passed its bill by a vote of 257 to 29.[27] In the course of these committee hearings extensive consideration was properly given to the question of what disposition of the submerged lands within State boundaries would be in the public interest. This fact is clearly reflected in each of the final committee reports.[28]

When Congress adjourned without further action, these bills remained pending on the Senate calendar and were so pending when the present suit was filed. The controversy became an issue in the 1948 Presidential campaign.[29] Already bills identical with that

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[25] Joint Hearings Before the Committees on the Judiciary, 80th Cong., 2d Sess., on S. 1988 and Similar House Bills, February-March, 1948; Hearings Before a Subcommittee of the Committee on the Judiciary, U.S. Senate, 80th Cong., 2d Sess., on S. 1988 and Similar House Bills, May, 1948.

[26] S. 1988 reported favorably in the Senate, Sen. Rep. 1592, June 10, 1948, 94 Cong. Rec. 7682 (1948) and H. 5992 reported favorably in the House, H. Rep. 1778, April 21, 1948, 94 Cong. Rec. 4722 (1948).

[27] 94 Cong. Rec. 5155 (1948).

[28] H. Rep. No. 1778, 80th Cong., 2d Sess., April 21, 1948, 12-23; S. Rep. No. 1592, 80th Cong., 2d Sess., June 10, 1948, 14-25.

[29] Only the Progressive Party advocated Federal control. 94 Cong. Rec. A5360 (August 9, 1948). A Federal control

passed by the House in the 80th Congress have been introduced in the 81st by 31 Senators and 23 Representatives.[30] On the other hand the President, in his annual message and his budget message, has called for action setting up Federal control.[31] The Attorney General and the Secretary of the Interior have recommended similar legislation.[32] Finally, a bill has been introduced in the Senate providing for study and determination of the necessity for laws defining the extent of the territorial waters of the United States.[33]

We are not here concerned with the merits or demerits of these two developing approaches to an equitable solution of the matter by Congress. That is a matter of policy within the legislative power. What is

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plank was defeated by the Democratic Party Platform and Resolutions Committee. See remarks of Senator McCarran, 95 Cong. Rec. 4234 (April 8, 1949). The Republican Party, 94 Cong. Rec. A4907 (July 28, 1948) and the States Rights Party, 94 Cong. Rec. A5055 (August 3, 1948) favored State ownership.

[30] S. 1545 by McCarran, Baldwin, Bricker, Butler, Byrd, Cain, Capehart, Connally, Cordon, Downey, Eastland, Ellender, Frear, Gurney, Hickenlooper, Holland, Jenner, Johnson of Texas, Johnston of South Carolina, Knowland, Long, Malone, Martin, Mundt, O'Conor, Reed, Robertson, Saltonstall, Schoeppel, Stennis, and Thye; S. 155 by Knowland; H. R. 71 by Hale; H. R. 180 by Gossett; H. R. 334 by Boggs; H. R. 860 by McDonough; H. R. 929 by Teague; H. R. 936 by Allen (La.); H. R. 1212 by Doyle; H. R. 1410 by Passman; H. R. 2137 by Bramblett; H. R. 2956 by Willis; H. R. 3206 by Phillips; H. R. 3243 by Holifield; H. R. 3387 by Anderson (Calif.); H. R. 3389 by Hinshaw; H. R. 3390 by Johnson (Calif.); H. R. 3398 by Sheppard; H. R. 3415 by Allen (Calif.); H. R. 3442 by Jackson (Calif.); H. R. 3484 by Scudder; H. R. 3560 by McKinnon; and H. R. 3591 by Werdel.

[31] Annual Message, 81st Cong., 1st Sess., 95 Cong. Rec. 66 (January 5, 1949); Budget Message, House Doc. 17, 81st Cong., 1st Sess., 95 Cong. Rec. 139 (January 10, 1949).

[32] 95 Cong. Rec. 1131-1132 (February 10, 1949) recommending S. 923.

[33] S. Res. 88, 81st Cong., 1st Sess., introduced by Senator Tydings, 95 Cong. Rec. 2268 (March 11, 1949).

vital for this Court to consider is that the entire matter of the disposition of the coastal submerged lands within the boundaries of all of the States has been presented to Congress, and that both sides in the present controversy are presently urging Congress promptly to adopt a national policy concerning the whole matter.

The Court and the Attorney General having indicated both to the Federal Government and to the States that resort to Congress for the settlement of their differences over the future ownership and leasing of submerged lands was proper under the circumstances, and both sides having in fact heeded this admonition and being now in the process of pressing their respective views on that body, it may be presumed that Congress will act within a reasonable time.

In taking such action Congress is adequately equipped to make the necessary appraisal and accommodation of the competing demands of the State and National interests involved. It thus may balance the interests of all the States and of their grantees in the undisturbed possession of a title they have assumed they held for over a century against the interest of the Federal Government in the preservation and protection of natural resources for national defense. Whether State regulation will interfere materially with the conduct of the Nation's international relations may there be fully debated. The inconveniences, dislocations and delays that will result if Congress can constitutionally shift from established and efficiently operated State regulation[1] to untried, centralized Federal regulation

[1] After the 1948 congressional hearings both House and Senate Judiciary Committees reported that "none of the Federal Government's representatives had any criticisms to offer concerning either the management by the States of their sub-

may be carefully weighed in the public interest." The material loss to all of the States of an important source of revenue may be balanced against Federal needs. Likewise, the question of whether the States should pay to the United States the monies collected from the area since June 23, 1947, is political in nature, involving such elements as good faith, credit for managing an essential development of natural resources, expenses, and other equities.

If Congress does take action, as it may reasonably be presumed that it will, that action will affect the very subject matter which this Court is being called on by the Attorney General to consider. In such a situation any disposition that this Court may make of the case might well be promptly altered or displaced by Congressional action. Cf. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941). If Congress does not act, thereby leaving Federal agencies without authority to lease or develop the lands, the public interest would not justify this Court in indefinitely prohibiting State action which has resulted and will continue to result in the discovery and development of the much needed resources in the area. Memorandum in Support of Proposed Decree, *United States v. California*, note 16 supra; Stipulation, note 20 supra; Letter from the Attorney General to the

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merged lands or the conservation regulations imposed upon the oil industry generally by the States." H. Rep. No. 1778, 80th Cong., 2d Sess., (April 21, 1948) 19; S. Rep. No. 1592, 80th Cong., 2d Sess. (June 19, 1948) 21.

Texas averages nearly $20.00 per acre on sealed bids for its undeveloped submerged lands as compared with 25 cents per acre on similar Federal leases. State rentals and royalties are also higher. Joint Hearings Before the Committees on the Judiciary, 80th Cong., 2d Sess., on S. 1988 and Similar House Bills, February-March, 1948, 1297.

[30] H. Rep. No. 1778 at 12-23; S. Rep. No. 1592 at 14-25.

President, Appendix A; *Oregon and Cal. Ry. v. United States*, 238 U.S. 393, 438-439 (1915).

Since this is true, it is proper for the Court to consider whether in the exercise of its discretion it should refuse to permit the filing of the Complaint at this time. Cf. *United States v. Morgan*, 307 U.S. 183, 194 (1939); *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 552 (1937). "The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision . . ."[36]

We think that a helpful analogy for such action is furnished by the cases where this Court has likewise refused to exercise its jurisdiction where there was another suitable forum available to the parties. *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939); *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 130, 131 (1933); *Canada Malting Co. v. Patterson Co.*, 285 U.S. 413, 422-423 (1932), and similar cases. While we recognize that the rule in these cases has been applied by this Court only in cases where it appeared that another *court* could more conveniently hear and determine the matter, we think that many of the same considerations which prompted the development of that doctrine are applicable in the situation now presented to this Court. Cf. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-509 (1947).

Many times before in its history this Court has refused to determine matters within the realm of the political departments of our Government. *Georgia v. Stanton*, 6 Wall. 50 (U.S. 1867); *cf. Massachusetts v. Mellon*, 262 U.S. 447 (1923); *Coleman v. Miller*, 307

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[36] *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941).

U.S. 433 (1939) (concurring opinion of Justices Black, Douglas and Frankfurter); *Chandler v. Wise*, 307 U.S. 474 (1939) (concurring opinion by the same justices); *Wilson v. Shaw*, 204 U.S. 24 (1907); *United States v. Standard Oil Co.*, 332 U.S. 301 (1947).

That the Court should here exercise its judicial self-restraint is indicated both by considerations of the effect of an assumption of jurisdiction at this time and of the inherent limitations to the effectiveness of the judicial process in controversies of this character.

As to the former it is obvious that the pendency of this and similar suits on the docket of this Court would interfere at least to some extent with Congress' freedom of action in the premises. In his veto of a State ownership and control bill in 1946, President Truman said:[37]

> "The jurisdiction of the Supreme Court should not be interfered with while it is arriving at its decision in the pending case."[38]

This "non-interference" policy should not be a one-way street in our constitutional system. The Court has decided the case which was then pending, and now the Congress has taken the subject matter under consideration. Its authority is not questioned by the *California* decision, and both sides are now presenting their claims in that forum for a determination that may forego the necessity of this litigation.

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[37] 92 Cong. Rec. 10660 (1946).

[38] Attorney General Clark told the Joint Committees on the Judiciary at the 1948 hearings:

> "I agree with the President. Questions of title should be settled through the Courts, and the Congress should await a decision in those cases." (Hearings on S. 1988 and Similar House Bills, 80th Cong., 2d Sess., February-March, 1948, 704.)

The California litigation has demonstrated that no injury will be suffered by the Federal Government if additional suits are delayed until Congress acts. On the other hand, this very positive injury to the public interest would result if jurisdiction is assumed before Congress acts:

1. Whether it is sound or not, the suggestion that the Congress should not act while the matter is pending before this Court will, as on a previous occasion, result in an interference with congressional action relating to the subject matter.

2. Under Texas laws the primary term of all mineral leases heretofore executed is extended during the pendency of any lawsuit challenging their validity.* The President, the Attorney General, and the Secretary of the Interior are committed to validation of present State leases even if this and similar suits are won.** Therefore, irrespective of which Government is the future landlord, the public would stand to suffer considerable loss of development by the automatic ex-

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* *Texas Civil Statutes* (Vernon 1948) Article 5421i:

"The running of the primary term of any oil, gas, or mineral lease heretofore or hereafter issued by the Commissioner of the General Land Office, which lease has been, is, or which may hereafter become involved in litigation relating to the validity of such lease or to the authority of the Commissioner of the General Land Office to lease the land covered thereby, shall be suspended, and all obligations imposed by such leases shall be set at rest during the period of such litigation. After the rendition of final judgment in any such litigation the running of the primary term of such leases shall commence again and continue for the remainder of the period specified in such leases and all obligations and duties imposed thereby shall again be operative; provided such litigation has been instituted at least six (6) months prior to the expiration of the primary term of any such leases."

** Explanatory Statement, S. 923, Senate Committee Print for Interior and Insular Affairs, 81st Cong., 1st Sess. (February 10, 1949).

tension of leases during the unnecessary pendency of this suit for the period of time before Congress acts.

Furthermore there are, we believe, limitations inherent in the nature of the judicial process which dictate that leave to file should not be granted at this time. The history of boundary controversies between the states, though distinct in many respects from that sought to be brought in the Complaint, nevertheless demonstrates by analogy that this Court is not the most convenient and efficient forum for their settlement. It has been pointed out in a careful study of the subject that such disputes have remained pending in this Court for five to twenty years or more.[11] The considered judgment was that there are "serious limits to effective judicial action" in such cases. The problem of determining the low-water mark along the coast of California has already indicated to this Court the great length of time that will inevitably be consumed before that boundary is finally determined. See *United States v. California*, 334 U.S. 855 (1948). It is apparent that the location of this line by the master even along small segments of the coastline will be a long and tedious process. Should a precedent be set by granting leave to file the Complaint against Texas, the granting of leave in similar cases against the remaining nineteen coastal States and possibly the seven States bordering the Great Lakes[12] may result in a

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[11] Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale Law Journal 685, 705-706 (1925), reprinted in 3 Selected Essays on Constitutional Law 1606, 1626-1627 (1938).

[12] Attorney General Clark testified at the 1948 Joint Hearings: "It is my present intention to file a suit against every State that I think is affected by the decision. . . . We have a group of boys working on all the States. . . . I rather think there is argument for saying it applies to all of the coastal

tremendous and unreasonable burden on the Court's time for many years. Every consideration of efficiency points to the desirability of the Court's deferring any action while Congress is attempting to resolve the conflicting interests in a manner which may be satisfactory to both the National and State Governments. In this way not only can the policy be established, but the means for implementing that policy may be provided."[4]

Because of its previously mentioned special defenses, Texas denies that Congress could constitutionally divest it of its title or of such control over the exploitation of its resources as does not interfere with the exercise of the delegated powers of the Federal Government. We recognize that Congress may attempt to resolve this controversy in a manner which would be unacceptable to the State and therefore require litigation. However, the Congress has not yet acted on the subject in any fashion, and the Attorney General does

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States of the United States."

Joint Hearings Before the Committees on the Judiciary, 80th Cong., 2d Sess., on S. 1988 and Similar House Bills, February-March, 1948, 616, 699, 703.

[4] Compare President Fillmore's views as expressed to Congress in his message concerning the Texas-New Mexico boundary controversy of 1850. There he said: "No government can be established for New Mexico, either State or Territorial, until it shall be first ascertained what New Mexico is, and what are her limits and boundaries. These can not be fixed or known till the line of division between her and Texas shall be ascertained and established; and numerous and weighty reasons conspire, in my judgment, to show that this divisional line should be established by Congress with the assent of the government of Texas. In the first place, this seems by far the most prompt mode of proceeding by which the end can be accomplished. If judicial proceedings were resorted to, such proceedings would necessarily be slow, and years would pass by, in all probability, before the controversy could be ended. So great a delay in this case is to be avoided if possible." 5 Richardson, J. D., A Compilation of the Messages and Papers of the Presidents, 1789-1907, 67, 72.

not know and this Court cannot anticipate that the Congress will ever attempt to exclude the State from its long recognized rights in the area. Under such circumstances, the State strongly urges that it should not be put to the expense, trouble and loss of revenues which will result from litigating claims or governmental powers which Congress may never attempt to assert or exercise.

The Court should not consider itself required to take jurisdiction of this and the possible 26 other cases affecting coastal and Great Lake States simply because it did so in the *California* case. Then the political nature of the real relief sought and the question of national policy involved were not as clear as now. The point was not raised as a reason for the Court's abstention. Not having been raised, it cannot be considered as having been decided. *Webster v. Fall*, 266 U.S. 507 (1925). Here the suggestion is timely made in the light of two years' evidence of its validity.

We therefore respectfully submit that, since action in Congress relating to the exact subject matter embraced in the Complaint is pending, leave to file the Complaint against Texas should be denied without prejudice.

## SECOND OBJECTION

**If any court should take jurisdiction, the interests of convenience, efficiency and justice will be better served by full development of the evidence in a federal district court, with customary appeal, than before a master in an original proceeding in this Court.**

*Statement in Support of Objection*

When this Court permitted the filing of the complaint in *United States v. California*, now cited by the Government as a precedent, it had "*exclusive* jurisdiction of all controversies of a civil nature where a state is a party."[22] (Italics added.) It does not now have that exclusive jurisdiction and did not have when the United States filed its motion in this case. The 80th Congress, in revising Title 28 of the United States Code, relieved this Court of the burdensome duty of exercising exclusive jurisdiction in such cases. The pertinent portions of the revision are as follows:

"§ 1251 Original jurisdiction

. . .

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

. . .

(2) All controversies between the United States and a State. . . ."

"§ 1345 United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

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[22] 28 U.S.C. § 341 (Judicial Code § 233)

It is admitted by the United States that the effect of the above quoted sections is to vest this Court and the district courts with concurrent jurisdiction over suits between the United States and a State.[4]

The revision of Title 28 in this respect is constitutional, because Article III, Section 2, Clause 2 of the Constitution of the United States does not vest this Court with exclusive jurisdiction over controversies coming within its provisions. *Georgia v. Pennsylvania Rg.*, 324 U.S. 439, 464 (1945); *Ames v. Kansas*, 111 U.S. 449, 469 (1884); *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 521 (1898). Although as originally enacted Section 233 of the Judicial Code (28 U.S.C. § 341) vested this Court with such exclusive jurisdiction, specific statutes thereafter enacted conferring on the district courts jurisdiction over certain types of controversies between the United States and a State have been sustained. The specific statutes were held to have superseded the general provisions of Section 233.[5]

The exercise of original jurisdiction by this Court in cases covered by Article III, Section 2, Clause 2 of the Constitution of the United States "is not mandatory in every case."[6] This Court has repeatedly rec-

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[4] Brief in Support of Motion, p. 4.

[5] Case v. Bowles, 327 U.S. 92, 97 (1946); Ames v. Kansas, 111 U.S. 449 (1884); Georgia v. Pennsylvania Ry., 324 U.S. 439, 464 (1945); United States v. Louisiana, 123 U.S. 32 (1887); United States v. California, 297 U.S. 175, 189 (1936). In Case v. Bowles, supra at 97, the Court said: "But it is well settled that despite Article III, Congress can give the district courts jurisdiction to try controversies between a state and the United States. . . . To that extent § 205 (e) of the Price Control Act supersedes § 233 of the Judicial Code."

[6] Georgia v. Pennsylvania Ry., 324 U.S. 439, 464 (1945); North Dakota v. Chicago & N.W. Ry., 257 U.S. 485 (1922); Georgia v. Chattanooga, 264 U.S. 472, 483 (1924); Oklahoma v. Cook, 304 U.S. 387, 396 (1938); Massachusetts v. Missouri, 308 U.S. 1, 19 (1939).

ognized the right of a court, in its discretion, to withhold the exercise of the jurisdiction conferred upon it where there is no want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency and justice. *Georgia v. Pennsylvania Ry.*, 324 U.S. 439, 464 (1945); *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939); *Canada Malting Co. v. Paterson Co.*, 285 U.S. 413, 422-423 (1932); *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 130-131 (1933); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947); *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 527 (1947); *Kansas City Southern Ry. v. United States*, 282 U.S. 760 (1931); *Langnes v. Green*, 282 U.S. 531, 544 (1931); *Georgia v. Chattanooga*, 264 U.S. 472, 483 (1924). See *Baltimore and O. Ry. v. Kepner*, 314 U.S. 44, 54 (1941) (dissenting opinion).

In *Massachusetts v. Missouri*, supra at 19, the Court said:

> "We have observed that the broad statement that a court having jurisdiction must exercise it (See *Cohens v. Virginia*, 6 Wheat. 264, 404) is not universally true but has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum. *Canada Malting Co. v. Paterson Co.*, 285 U.S. 413, 422; *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 130, 131. Grounds for justifying such a qualification have been found in 'considerations of convenience, efficiency and justice' applicable to particular classes of cases. *Rogers v. Guaranty Trust Co.*, supra. . . ."

The following was said in *Rogers v. Guaranty Trust Co. of New York*, supra at 131:

"... it safely may be said that jurisdiction will be declined whenever considerations of convenience, efficiency and justice point to the courts of the state of the domicile as appropriate tribunals for the determination of the particular case. ..."

In *Koster v. Lumbermens Mut. Casualty Co.*, supra at 527, it is said that ". . . the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice."

The revision of Title 28 of the United States Code serves an important purpose in affording the opportunity for this Court, primarily an appellate tribunal and not well adapted to the exercise of original jurisdiction over suits of this nature, to relieve itself of the burdensome duty of trying as original suits these ever-increasing controversies between the United States and the States. There is nothing in the pertinent sections of Title 28[1] or in the hearings on this revision to indicate any intention on the part of Congress that only controversies of "very limited importance"[2] or "minor significance"[3] between the United States and a State be tried before a district court, as argued by the United States. The district courts have many times shown their ability to try "controversies of the first magnitude in importance,"[4] and we see nothing at all "inappropriate"[5] about proceeding before a district court in the present case.

An allocation of original jurisdiction will not preclude this Court from exercising its appellate juris-

[1] 28 U.S.C. §§ 1251, 1345.
[2] Supplemental Memorandum in Support of Motion, p. 2.
[3] Brief in Support of Motion, p. 8.
[4] Supplemental Memorandum in Support of Motion, p. 2.
[5] Ibid.

diction if either party should be dissatisfied with the decision of the district court or the circuit court of appeals. This it is not a case where the Court by refusing to exercise its original jurisdiction loses all opportunity to pass on the merits of the case, since this Court will still have such opportunity as the final appellate tribunal.

The United States suggests the rule that "the grant of concurrent jurisdiction implies that, in the first instance, the plaintiff shall have the choice of the court." However, this does not mean "that the plaintiff's choice cannot be questioned" or "that the Court must respect the choice of the plaintiff." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506 (1947).

The prior suit against California and the present suits sought to be filed against Texas and Louisiana are only the first of many suits which the Attorney General has expressed his intention to file to determine the rights in the lands, minerals and other things underlying the marginal sea within the boundaries of the states littoral to the Atlantic and Pacific Oceans, the Gulf of Mexico, and possibly the Great Lakes.[1] As admitted by him, and as will no doubt be contended by all of these other states, the *California* case will "not be decisive as to the rights of any other State." The United States may therefore file at least twenty and possibly twenty-seven similar suits.[2] If the Court

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[1] Brief in Support of Motion, p. 5.

[2] See note 12 supra.

[3] See notes 3 and 4 supra.

[4] These would include Alabama, Connecticut, Delaware, Florida, Georgia, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Oregon, Rhode Island, South Carolina, Texas, Virginia and Washington; and possibly Illinois, Indiana, Michigan, Minnesota, Ohio, Pennsylvania and Wisconsin.

permits the United States to file this action as an original suit in this Court, it will thereby set a precedent for the filing of the many other suits in the same manner. It is possible that each of these suits if brought as an original action in this Court may pend for a period of from five to twenty years or more. The enormous drain on the Court's time and energy involved in the trial of all of these intricate suits as original proceedings is obvious.* However, by denying leave to file in the present case without prejudice to the right of the United States to bring suit in the appropriate district court, the Court will set a precedent which will result in the distribution of this tremendous burden among numerous courts instead of concentrating it on one court. Of course it still may be necessary for this Court to hear some of these cases in its function as the final appellate tribunal, but the task of the Court in such cases would be the one for which it is best fitted.

If the Court takes this case as an original action, it certainly would be more efficient and expeditious to appoint a master to first hear the evidence rather than for the Court initially to do so. Contrary to the situation in a similar proceeding against the State of California in which neither party "suggested any ne-

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* See Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale Law Journal 685, 705-706, n. 87 (1925), reprinted in 3 Selected Essays on Constitutional Law 1606, 1626-1627, n. 87 (1938).

The difficulties encountered by the Court in exercising its jurisdiction over the controversy between Oklahoma and Texas involving the Red River boundary dispute are well known. The initial citation to this controversy is Oklahoma v. Texas, 252 U.S. 372 (1920). Filed on April 1, 1920, the case was concluded on May 18, 1931, during which time the Court wrote a total of 107 memoranda, opinions and orders. See 68 Fed. Dig. 413-414.

cessity for the introduction of evidence,"[30] the State of Texas in this case will suggest the necessity and ask for the right to develop the evidence fully. Counsel for the United States have stated that they "know of no matters of relevant fact that call for the taking of testimony or presentation of evidence in this case any more than in the decision of the basic issues in the California case."[31] However, the United States already has admitted that Texas entered the Union under circumstances different from those under which California entered,[32] and while its Attorney General now attempts to minimize the relevancy of those differences, he has stated numerous times that Texas has "special defenses" and "special rights" that exist in favor of no other State.[33]

In the event of trial it is certain that the United States will need to offer evidence if it undertakes to discharge the burden of proving the allegations in its Complaint. Texas will demand strict proof of every allegation asserted adversely to it, because it does not believe that superior title or interference with paramount governmental powers can be proved against this State. In the event of trial Texas will offer a great amount of testimony and documentary evidence in the form of maps, diplomatic correspondence, personal papers of many men who had a part in the annexation of Texas, and other similar forms of documentary evidence. The majority of these documents are in the archives and records of various departments of the State of Texas and in personal papers located in Texas libraries. Evidence will be offered on many

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[30] 332 U.S. at 21.

[31] Supplemental Memorandum in Support of Motion, pp. 2-3.

[32] Motion for Leave to File Complaint, p. 3.

[33] See notes 3 and 4 supra.

matters, a few of which are: the ownership and use of these lands and minerals by the independent Republic of Texas under Spanish and Mexican law; the defense and maintenance of the Gulfward boundaries of the Republic of Texas for nearly ten years by the Texas Navy; and the circumstances leading to the final agreement of annexation by which Texas retained all land and minerals within its boundaries not specifically conveyed to the United States. Texas will seek to develop the many instances in which this interpretation of the annexation agreement has been made by the United States, and also show that the filing of this suit is the first time since annexation in 1845 that any official of the United States has placed a different interpretation on the agreement with Texas. It would be impossible for the Court to decide the basic legal issues of the case without having this and other evidence before it.

The necessity for the appointment of a master in the event this action is brought as an original action in this Court presents a strong reason why the Court should deny leave to file the Complaint in order to permit the suit to be filed in the appropriate district court. The evidence, documentary and otherwise, can be brought more easily before a federal district court, such court being in proximity to the witnesses and documents and better adapted by reasons of its rules of procedure, available court rooms and other facilities for the hearing of such evidence.

Also, the general rule in our system of jurisprudence that title suits should be tried in Federal or State courts within the State where the land is located is particularly applicable in this case. If plaintiff should be successful in its suit it will necessitate a long and tedious process of locating the shore line and low-

water mark along the 370-mile Texas coast. The efforts at demarcation of this line along the coast of California have indicated already to this Court the great length of time and expense that inevitably will be consumed in the determination of the line by a master. Almost two years have passed since the California decision without the line having been fixed on any segment of that coast. These determinations could be made more expeditiously and conveniently and with far less expense by a district court permanently located near the property in question."

The above factors are important considerations in determining whether the Court should take jurisdiction of this case or remit the parties to the appropriate district court, since it is proper for the Court to consider "all other practical problems that make trial of a case easy, expeditious and inexpensive."[63]

For these and many other reasons better known to this Court, it is obvious that it will be more convenient and expeditious if the appropriate federal district courts exercise their original jurisdiction over controversies of this nature. This view is supported by the dissenting opinion (and the distinguishing reaction thereto by the majority) of Mr. Chief Justice Stone, in which he was joined by Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Justice Jackson, in *Georgia v. Pennsylvania Ry.*, 324 U.S. 439, 470 (1945). There it was said:

> ". . . In an original suit, even when the case is first referred to a master, this Court has the duty of making an independent examination of the evidence, a time-consuming process which seriously interferes with the discharge of our ever increas-

[63] Gulf Oil Corp. v. Gilbert, 330 U.S. 501; 508 (1947).

ing appellate duties. No reason appears why the present suit may not be as conveniently proceeded with in the district court of the proper venue as in this Court, or why the convenience of the parties and witnesses, as well as of the courts concerned, would be better served by a trial before a master appointed by this Court than by a trial in the appropriate district court with the customary appellate review. The case seems preeminently one where this Court may and should, in the exercise of its discretion and in the interest of a more efficient administration of justice, decline to exercise its jurisdiction; and remit the parties to the appropriate district court for a proper disposition of the case there."

The only apparent reason why the Court declined to remit the parties to a district court in that case is that it was not clear that all of the defendants could be found in one judicial district. But for this reason the majority of the Court in that case indicated that such procedure as is here requested "would be wholly appropriate." This reason does not exist in this case, for here the appropriate federal district court in Texas would have jurisdiction over all the parties as well as over all the lands in dispute.

As said by this Court in *Kennedy v. Silas Mason Co.*, 334 U. S. 249, 256 (1948):

> "The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine."

No reason has been shown by the United States, and

none appears, why the present suit may not proceed conveniently in the federal district court of the proper venue, or why the convenience of the parties or the courts would be better served by a trial before a master appointed by this Court than by a trial in a district court with the customary appellate review. None of the cases cited by the United States in its brief[*] is in any way inconsistent with the procedure here requested. Instead, they support in principle such procedure.

Without waiving the first objection heretofore made, it is believed that if a suit is to be filed at all, the interests of convenience, efficiency and justice will be better served by this Court's denial of the motion of the United States for leave to file its Complaint against the State of Texas, without prejudice to the right to bring suit in the appropriate federal district court.

## CONCLUSION

We respectfully submit that the motion for leave to file the Complaint should be denied without prejudice.

Respectfully submitted,

PRICE DANIEL,
Attorney General of Texas

J. CHRYS DOUGHERTY
Assistant Attorney General

JESSE P. LUTON, JR.
Assistant Attorney General

April, 1949.

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[*]Brief in Support of Motion, p. 5.

## APPENDIX A

October 30, 1947

The Honorable
The President of the United States
White House
Washington, D. C.

My dear Mr. President:

The Supreme Court on Monday, October 27, 1947, entered a decree declaring that the United States is possessed of paramount rights in, and full dominion over, the land, minerals and other things underlying the Pacific Ocean lying seaward of the low-water mark on the coast of California.

The signing of the decree brings to a successful termination the first phase of efforts being made to establish the rights of the United States in the areas which, up to this time, had been claimed by the State. The Supreme Court decided that the United States is entitled to injunctive relief, and that the State of California has no title to the submerged lands in the belt claimed by the United States. The decision, we believe, is of vital importance to all the people of the country.

In signing the decree, the Supreme Court denied various petitions of parties who have been attacking two stipulations entered into by the Government with the State of California; and also eliminated the stipulations from the proceedings as not being relevant to any issue now before the Court. This action does not, as the Court indicated, have any effect on the status of the stipulations.

The claim of the United States to rights in the

coastal submerged lands off the coast of California lying between the low-water line and the three-mile limit was one of the first matters to receive my active attention after I assumed the post of Attorney General of the United States on June 30, 1945. Within little more than three months of my taking office, in October, 1945, I filed, with your approval, the action which culminated on June 23, 1947, in the opinion of the Supreme Court of the United States recognizing the paramount rights of the United States in the marginal sea area off the coast of California.

The opinion of the Supreme Court last June gave rise to a variety of unusually complex problems. The most pressing of these was the urgent need of assuring continued oil production in the coastal waters off California. Continued oil production was necessary in the interest of the United States, inasmuch as the closing down of the wells would have resulted in seepage, loss of the oil and damage to wells and equipment. There was also a shortage of petroleum products, and oil producers generally were being urged by the Government to make every effort to increase production for military as well as civilian purposes. It was also not clear as to precisely which wells were covered by the Court's decision and were to be regarded as the property of the United States. It has not been specifically determined which of the submerged lands fall within the Court's general declaration that the United States has paramount rights in the marginal sea, as distinguished from the bays, harbors and inland waters to which the Government of the United States has consistently reiterated that it made no claim.

To protect the public interest, the Secretary of the Interior and I decided to deal with such problems as

could not await Congressional and further judicial action. We, as you know, entered into two stipulations with the State of California. Both recited that nothing therein should "be deemed in any way to abridge the power or jurisdiction of the Supreme Court." It was specifically stated in the so-called "operating stipulation" that it was a purely interim arrangement, that it should continue in effect only until pertinent legislation was enacted by Congress and, in any event, no later than September 30, 1948. The State of California agreed to place its revenues from all disputed wells in escrow, to await final settlement. To make sure that Congress would have a clean slate on which to legislate, the Secretary of the Interior and I insisted that the stipulation provide that nothing therein was to "be deemed to waive or abridge any right or claim which the United States now has or may hereafter have against any lessee or grantee of the State of California." Persons operating pursuant to the stipulation will, with respect to operations conducted after June 23, 1947, be permitted to retain such costs of operation as innocent trespassers are permitted to retain by the California statutes.

While the United States thus waived no rights in this stipulation, it did reaffirm previous statements which you had authorized me to make to the effect that there was no desire on the part of the administration "to destroy or confiscate any honest or bona fide investment" and that we would recommend to the Congress that legislation be enacted "designed to relieve California and those who have operated under State authority, from the necessity of accounting to the United States for revenues derived in the past from the exploitation of any of the lands here involved."

This policy was neither a new one nor a departure

from previous statements of the executive branch of the Government. In testifying before the Senate Judiciary Committee in February, 1946, the then Secretary of the Interior, Harold L. Ickes, said this with respect to what would happen if the Government prevailed in the suit against California:

"There will, in the first place, be appropriate occasion for relief legislation. In contrast with my friends from California, I do not pretend that the issue of ownership has ever been clear. Nor do I believe that anyone should be penalized for good faith reliance upon the State's claim of ownership. This involves at least two general principles.

"1. The States concerned and those who have operated under State law should be relieved from any liability for damage in trespass for any past development of the submerged land. Specifically neither should be required to account for oil or gas extracted before the date of the decision by the Supreme Court. Leases and contracts for operations on submerged lands outstanding when the present suit was filed in the Supreme Court should be continued in force and effect by the Federal Government, at least as to royalty rate and time limit.

"2. Structures, such as docks or piers, which may have been erected on the submerged lands and the surface ownership of filled-in areas should not be disturbed if they were erected or filled in accordance with the Federal or State law."

The statements made by Mr. Ickes went far beyond the stipulations of July 26, 1947. On July 22, 1947, four days before the stipulations were executed, copies of them were delivered to Senator Hugh Butler, chair-

man of the Senate Committee on Public Lands, and to Hon. Richard J. Welch, chairman of the House Committee on Public Lands. These copies were accompanied by letters signed by Secretary Krug and me, explaining the reasons for the stipulations, and asking for comments. Both chairmen showed keen interest in the matter, and no unfavorable comments were received.

In presenting its arguments to the Supreme Court, the Government had consistently asserted that it was making no claim to bays, harbors and inland waters. The three areas described in the so-called "bays and harbors" stipulation had been specifically named as not being within its claim.

For example, the Long Beach area, in San Pedro Bay, was stated to be not within the three-mile belt, and it was pointed out that a lower Federal court had already ruled that this area was to be regarded as inland waters. We concluded that the areas which were made the subject of this stipulation were not within the belt in which the United States had paramount rights, and the statement that they were not being claimed was deemed desirable as evidence of the Government's sincerity in its repeated assertions that it was not making any claims to bays and harbors. The City of Long Beach owns the oil wells in the harbor of San Pedro Bay. While the city was not a party to the pending suit, the United States recognized that since the Government could make no claim to these wells (as being in a conceded bay), it was only just to make a formal declaration to that effect.

I am reporting to you on these stipulations in some detail, because their provisions and effect have been

misunderstood. The fact is that the stipulation on operations was necessary to conserve the oil supplies, and prevent enormous wastage and loss; and the stipulation on the Government's claim was limited in scope, so as to make sure that no portion of the Federal property was involved.

Congress is now in a position to determine how the assets which have been declared to be the property of the United States shall be administered. Only a relatively small section of the marginal sea has been developed. What has been recovered may prove, in the coming years, to be but an insignificant fraction of the undeveloped and as yet unknown resources in the remaining area.

Respectfully,

[Signed] TOM C. CLARK

Attorney General

Office - Supreme Court, U. S.
FILED
AUG 27 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948

No. ~~14~~ 13, Original

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

## MOTION FOR MORE DEFINITE STATEMENT OR BILL OF PARTICULARS AND FOR EXTENSION OF TIME TO ANSWER OR OTHERWISE PLEAD

PRICE DANIEL
Attorney General of Texas
J. CHRYS DOUGHERTY
Assistant Attorney General
JESSE P. LUTON, JR.
Assistant Attorney General
K. BERT WATSON
Assistant Attorney General

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948

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No. 14, Original

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UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

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## MOTION FOR LEAVE TO FILE

The State of Texas, by its Attorney General, subject to its motion to dismiss the complaint filed herein by the United States of America, asks leave of the Court to file its motions for more definite statement or bill of particulars and for extension of time to answer or otherwise plead.

PRICE DANIEL
Attorney General of Texas

## MOTION FOR MORE DEFINITE STATEMENT OR BILL OF PARTICULARS

Comes now the State of Texas, the defendant in the above-entitled cause, by its Attorney General, and, subject to its motion to dismiss, moves the Court, in accordance with English rule (Order XIX, Rule 7) and with former Federal Equity Rule 20, and upon the analogy of Rule 12(e) of the Federal Rules of Civil Procedure, for an order requiring the plaintiff to make a more definite statement or to file a bill of particulars as to certain matters in the complaint filed on the 16th day of May, 1949. The complaint is defective because the allegations thereof are not set forth with sufficient definiteness or particularity to enable the defendant properly to frame its responsive pleadings, to prepare for trial, or to be in a position to take advantage of all defenses available to it, in the following respects:

I

As to what times are referred to in the phrase "all times herein material" in paragraph II of the complaint. Specifically, defendant is entitled to know:

A. At what time the plaintiff contends it became "the owner in fee simple of . . . the lands, minerals and other things" in the area described in the complaint. If the fee simple ownership of all of the lands and the minerals and the other things is not claimed to have been acquired simultaneously, the defendant is entitled to know when plaintiff con-

tends that it acquired such ownership of each and whether such acquisition extended to all or only to a portion of the area described in the complaint, and, if the latter, to what portion.

B. At what time the plaintiff contends that it became "possessed of paramount rights in, and full dominion and power over the lands, minerals and other things" in the area described in the complaint. If the paramount rights or the full dominion or the full power are not claimed to have been acquired simultaneously, the defendant is entitled to know when each is claimed to have been acquired. If the paramount rights, full dominion, and full power, or any of them, are not claimed to have been acquired as to lands or minerals or other things simultaneously, the defendant is entitled to know when the paramount rights, full dominion, and full power, or any of them, are claimed to have been acquired in each. If the paramount rights, full dominion, and full power, or any of them, are not claimed to have been acquired simultaneously as to all portions of the lands and minerals and other things, or any of them, the defendant is entitled to know at what time the paramount rights, full dominion, and full power, or any of them, are claimed to have been acquired in each of the respective portions of the lands and minerals and other things, or any of them.

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The defendant must be informed of the date or dates on which the plaintiff contends that its ownership, or paramount rights, full dominion, and full power, or any of them, originated, in order that the

defendant may determine the period or periods during which plaintiff's claim is asserted. Defendant's responsive pleading and the nature and type of evidence necessary to meet without surprise the contentions which actually will be made at the trial will vary according to the date plaintiff contends its title originated. For instance, defensive and affirmative pleading and preparation of evidence to meet a claim of title or powers acquired prior to the annexation of Texas in 1845 would vary from that necessary to meet a claim of acquisition at the time of such annexation or subsequent thereto. In the present state of the complaint, defendant cannot fairly be called on to frame a responsive pleading or prepare for trial.

Furthermore, it is apparent that it will be necessary to treat in distinct portions the area described in the complaint and to segregate the ownership or paramount rights, full dominion, and full power as each relates to lands, minerals, or other things within those distinct portions. In this connection, it is obvious that the total area described in the complaint comprises submerged lands which were within the original seaward boundaries of the State of Texas (3 leagues from shore) at the time of annexation and also the lands lying seaward of such original 3-league boundary and between it and the outer edge of the continental shelf. Defendant is entitled to be informed whether and how the claims of plaintiff differ as to these two distinct areas with respect to time of acquisition as well as to other details hereinafter set out. The time of acquisition is also an

essential element in fixing "ordinary low-water mark," as explained in paragraph VIII (See pages 14 to 16, *infra.*)

II

As to the source or sources of plaintiff's alleged ownership in fee simple of the lands, minerals, and other things underlying the area described in the complaint. If the fee simple ownership of all of the lands and minerals and other things is not claimed to have been acquired from the same source, then the defendant is entitled to know from what sources plaintiff contends that it acquired such ownership of each and whether such acquisitions extended to all or only to separate portions of the area described in the complaint, and, if the latter, to what portions.

The plaintiff does not state whether its alleged ownership is derived from discovery, occupation, conquest, cession, purchase, condemnation, or lease; whether it is derived from governmental rights and powers under the Constitution; whether this alleged ownership is vested in it as a member of the family of nations; or in what other manner or from what other source plaintiff acquired such alleged ownership.

Defendant must be informed of the ultimate facts concerning the source or sources of plaintiff's alleged fee simple ownership before it can fairly be called upon to frame its responsive pleadings or make adequate preparation for trial. This is particularly true since, as mentioned in paragraph I above, it is ap-

parent that the total area described in the complaint will have to be treated in distinct portions.

III

As to what paramount rights, full dominion and power are referred to in the phrase, "paramount rights in, and full dominion and power over," in paragraph II of the complaint. Specifically, the defendant is entitled to know:

A. Exactly what paramount rights plaintiff alleges that it possesses in the "lands, minerals and other things" in the area described in the complaint. In this regard, defendant is entitled to know:

1. The source or sources of these rights.
2. The nature of these rights.
3. How the paramount rights in these "lands, minerals, and other things" differ from those in lands, minerals and other things beneath other navigable waters within the boundaries of the State of Texas.

B. Exactly what is meant by and included within the allegation of "full dominion." In this connection, defendant is entitled to know:

1. The source or sources of this dominion.
2. The nature of this dominion and, specifically, whether it refers to that kind of sovereign proprietorship which plaintiff possesses with regard to public lands in States other than Texas; whether it refers to rights of sovereignty which plaintiff possesses with regard

to all lands within the boundaries of the United States; whether it refers to rights which plaintiff possesses with respect only to lands beneath other navigable waters within the boundaries of the State of Texas; or whether it refers to some other character of rights. If the last, defendant is entitled to know their nature and incidents.

3. Whether this "full dominion" is claimed to mean exclusive dominion over the area and control of all governmental activities therein. If not, the defendant should be furnished with full particulars as to the extent of the dominion claimed.

C. Exactly what power it is alleged in paragraph II of the complaint the plaintiff possesses over the "lands, minerals and other things" in the area described. In this connection, defendant is entitled to know:

1. The source or sources of this power.
2. The nature of this power.
3. How this power over the "lands, minerals and other things" differs from that over the lands, minerals, and other things beneath other navigable waters within the boundaries of the State of Texas.
4. Whether this "full power" is claimed to mean exclusive power over the area described in the complaint and control of all governmental activities therein. If not, the defendant should be furnished with full particulars as to the extent of the power claimed.

D. Whether plaintiff claims that the alleged "paramount rights in, and full dominion and power over," or any of them, include ownership or the exclusive right to exercise those rights with respect to the lands, minerals, and other things described in the complaint which ordinarily are incident to ownership of lands and minerals beneath other navigable waters within the boundaries of the State of Texas.

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The nature and elements of the concept of ownership in fee simple as claimed by plaintiff are relatively clear and certain, but the alternative claim of "paramount rights in, and full dominion and power over" is wholly devoid of such clarity and certainty. The latter, being a general phrase having no well-recognized or established meaning as to its nature, extent, or elements, fails to advise defendant of what claims it must admit or deny in its responsive pleading and be expected to meet on the trial.

Specifically, plaintiff has certain paramount rights and powers over the area in question which defendant would admit, such as control of commerce, navigation, and national defense. There is a certain type of dominion which the defendant would admit. On the other hand, plaintiff apparently includes in this broad allegation other alleged paramount rights and powers and dominion which defendant would deny. Unless this Court requires plaintiff to plead with more definiteness and certainty the exact nature of the paramount rights, full dominion, and power which defendant is charged with violating and denying, the defendant is at a total loss to know how properly to prepare its responsive pleading. The

burden should not be placed upon the defendant by this generalized pleading to pick out and enumerate all the paramount rights and powers and the type of dominion which it will admit and those which it will deny. Plaintiff, rather than defendant, should be required to bear the burden of enumerating the paramount rights, powers, and dominion which it expects to place in issue by this litigation.

Further, defendant is entitled to know whether plaintiff is claiming by this alternative plea the exclusive power over, the concurrent power over, or the right to determine in the first instance who shall conduct, any or all of the following activities in the area described:

a. Such management, leasing, taking, or using of oyster beds as is subject to and does not interfere with federal control of navigation, national defense, or international affairs.

b. Such management, leasing, taking, or using of kelp (iodine weed) beds and other marine vegetation as is subject to and does not interfere with federal control of navigation, national defense, or international affairs.

c. Such management, sale, removal, or use of sand, gravel, shell, and other non-mineral substances as is subject to and does not interfere with federal control of navigation, national defense, or international affairs.

d. Such management, leasing, or use of submerged lands for construction of piers, wharves, docks, and other structures as is subject to and does not interfere with federal control of navigation, national defense, or international affairs.

e. Such filling in of submerged areas for future construction of improvements and extension of the shore as is approved by the War Department.

f. Collection of taxes on property built upon, in, or over such land.

g. Conservation and proration of oil, gas, and other mineral production thereon.

h. Such management, regulation, or control of geophysical operations as is subject to and does not interfere with federal control of navigation, national defense, or international affairs.

i. Such regulation or control of fisheries (free and sedentary) and other marine life as is subject to and does not interfere with federal control of navigation, national defense, or international affairs.

j. Such establishment, regulation, or control of playgrounds (extending below low-tide) and surf bathing as does not interfere with federal control of navigation, national defense, or international affairs.

k. Those police powers being exercised by the State subject to and without interference with federal control of navigation, national defense, or international matters.

The only specific right or power which can be inferred from the complaint as being claimed by plaintiff is the right to determine in the first instance when, how, and by what agencies the petroleum, gas, and other mineral deposits of the area may be exploited. State management and operation of such mineral resources is the only specific act of the State of Texas complained of as being "in violation of the rights of the United States." If this is the only alleged right, dominion, or power over which there is

alleged conflict or controversy and on which the prayer for injunction is based, plaintiff should be required to define and limit the alternative plea in paragraph II accordingly. If more is claimed, defendant is entitled to know it now in clear and certain terms.

## IV

As to what rights of the United States defendant or its lessees are alleged in paragraphs V and VII of the complaint to have violated, failed to recognize, and denied. Specifically, plaintiff should be required to state clearly and definitely the nature of the "rights" claimed by the United States at the following places in the complaint:

A. Line 4, paragraph V, in which plaintiff alleges that the State's lessees "have, in violation of the rights of the United States, paid the State substantial sums of money, entered upon said lands and drilled wells for the recovery of petroleum, gas and other hydro-carbon substances."

B. Line 15, paragraph V, in which it is alleged that neither the State nor its lessees "have recognized the rights of the United States" in the area.

C. Line 1, paragraph VII, in which it is alleged that "the State has frequently and publicly denied the rights and powers of the United States in the area."

D. Line 13, paragraph VII, in which it is alleged that the State will continue to trespass upon the area "in violation of the rights of the United States."

At no place in the complaint are these alleged rights of the plaintiff defined or clearly stated. It is not clear whether "rights" is intended to mean rights of ownership or rights incident to the "paramount rights in, and full dominion and power over" alternatively alleged or both. In any event, and for the same reasons stated in paragraph III of this motion, defendant must know the exact nature of the rights which it or its lessees are alleged to have violated, failed to recognize, and denied before it can make a proper responsive pleading.

V

As to what alleged "rights" the plaintiff seeks in the prayer in paragraph VII of the complaint to have adjudged and declared and to enjoin the defendant from further allegedly violating..

The generalities and uncertainties of the complaint are emphasized by the general prayer for relief as follows:

> "Whereof [*sic*], plaintiff prays that a decree be entered adjudging and declaring the rights of the United States as against the State of Texas in the area herein described, enjoining the State of Texas and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States. . . ."

The reasons stated in paragraphs III and IV of this motion are equally applicable in support of the above request for more definite statement or more

particulars. The defendant must know before it can prepare a responsive pleading that will properly join the issues in the case, what rights are sought by the plaintiff in this litigation. Specifically, it must know whether the United States is seeking an adjudication and an injunction preventing the exercise by the State of any of those rights listed in "a" through "k" in paragraph III (See pages 9 to 10, *supra.*)

VI

As to what minerals are intended to be included in the phrase "minerals . . . underlying the Gulf of Mexico" in paragraph II of the complaint. Specifically, defendant is entitled to know whether plaintiff claims only those minerals found in the seabed and subsoil within the area described in the complaint or whether it seeks also to claim the minerals or mineral substances in the waters underlying the surface of the Gulf of Mexico.

In this respect, the complaint is defective because the generality of this allegation does not clearly advise the defendant of the specific claim against which it must defend. Unless defendant is so advised, it has no way of knowing the extent of plaintiff's claim, and thus will be unable to frame its responsive pleadings and will be put to unnecessary expense and effort in preparation for trial.

VII

As to what things are intended to be included in the phrase "other things underlying the Gulf of

Mexico" in paragraph II of the complaint. Specifically, defendant is entitled to know:

A. Whether the plaintiff claims only the "other things" found in the lands within the area described in the complaint or whether it seeks also to claim the "other things" in the waters underlying the surface of the Gulf of Mexico.

B. Whether the term "other things" includes all non-mineral substances such as sand, gravel, shell, kelp and other marine vegetation, oysters, sedentary fish, free swimming fish, and other marine life, or only some portion of them, and, if the latter, what portion.

In all fairness to defendant, so it may properly answer and prepare for trial and avoid unnecessary pleading and preparation, if claims to any of these types of property are asserted, plaintiff should be required to plead more definitely what it claims against the State of Texas within the term "other things underlying the Gulf of Mexico."

VIII

As to what is meant by the phrase, "ordinary low-water mark on the coast of Texas" in paragraph II of the complaint. Specifically, the defendant is entitled to know:

A. The low-water mark of what year or time to which the plaintiff refers. It is obvious that the ordinary low-water mark has varied from year to year. Is the alleged ordinary low-water mark that which existed at the time the plaintiff contends that it be-

came "owner in fee simple of, or possessed of paramount rights in, and full dominion and power over" the area or at the time this action was commenced or at some other time, and, if the last, what time?

B. The period the plaintiff contends is determinative of the "ordinary low-water mark." That some period must have been contemplated is indicated by plaintiff's characterization of the low-water mark as "ordinary." In this connection, defendant is further entitled to know:

1. The length of the period which the plaintiffs contend is determinative of the "ordinary" low-water mark. Is this period a day, a week, a month, a year, 18.6 years, or some other period?

2. How the plaintiff claims this determinative period for the ordinary low-water mark is applied with relation to the time plaintiff alleges it acquired its ownership or paramount rights and full dominion. Is the determinative period applied before, after, or partially before and partially after the time of acquisition?

Defendant is entitled to know the length of the period by which the plaintiff fixes the ordinary low-water mark and the relationship which the plaintiff asserts as existing between this determinative period and the time as of which the low-water mark is fixed.

C. Whether low-water mark is measured on artificially filled land along the shore or only on land in its natural state.

D. Whether the "low-water mark" is that line of the high-low or of the low-low tides in the Gulf of Mexico or the mean of low tides.

E. Whether the term "ordinary low-water mark on the coast of Texas" means the ordinary low-water mark measured at every conceivable point along the shore line or only a straight line connecting salient points located at ordinary low-water mark along the shore, and, if the latter, what are these salient points?

---

Defendant is entitled to know with certainty the lands being claimed by plaintiff, especially the line of demarcation in the valuable area immediately adjacent to the shore.

## IX

As to what waters are referred to by the term "inland waters" in paragraph II of the complaint. Specifically, the defendant is entitled to know:

A. The standard or rule followed in fixing the location and extent of the "inland waters" referred to in the complaint.

B. As of what time the location of the "inland waters" is fixed.

C. From what points the lines marking the seaward limits of bays, harbors, rivers, channels, and other inland waters are drawn.

D. Whether waters between the mainland and the offshore islands on the coast of the State of Texas are included within the term "inland waters."

E. If the waters in "D" above are included within the term "inland waters," then from what points on the islands off the coast of Texas or in the adjacent waters are the lines marking the extremities of the inland waters drawn.

---

Before the defendant fairly can be called upon to prepare, and before it can prepare, its responsive pleading, it is entitled to know, and must know, the line of demarcation between "inland waters" and "the waters of the Gulf of Mexico" which the plaintiff uses as a delimiting boundary to its claim of lands, minerals, and other things. If the plaintiff is not seeking to claim the lands, minerals, or other things beneath certain waters, then the defendant should be told now exactly where the boundary line is which separates those lands, minerals, and other things claimed by plaintiff from those not so claimed.

The ultimate facts concerning the precise extent of the area which plaintiff claims must be set forth in order that defendant may know whether it or its alleged lessees are, and to what extent they are, being charged with trespassing upon the alleged rights of the plaintiff. In the absence of such specification, defendant cannot fairly be called upon to frame a responsive pleading, will be subjected to unnecessary loss of time, effort, and expense in preparation for trial, and may find it impossible to take advantage of all available defenses to plaintiff's claims.

## X

As to the precise location of the seaward external boundaries of the area sought to be described in par-

agraph II of the complaint as "extending seaward to the outer edge of the continental shelf and bounded on the east and southwest, respectively, by the eastern boundary of the State of Texas and the boundary between the United States and Mexico." Specifically, defendant is entitled to know the precise location and extent of the alleged "boundary between the United States and Mexico."

It is apparent that the boundary description in the complaint when applied to the physical area off the coast of Texas does not describe a closed area and is therefore vague and indefinite. The Court judicially knows that the United States-Mexican boundary as confirmed by the Treaty of Guadalupe Hidalgo of 1848 and the Gadsden Treaty of 1853, extends seaward of the mouth of the Rio Grande River for a distance of only 3 leagues. The complaint neither alleges ultimate facts showing any alteration or extension of this confirmed boundary so as to cause it to intersect with the edge of the continental shelf, nor does it otherwise identify the point of intersection. Defendant thus is not clearly advised of the precise extent of the area which plaintiff claims.

XI

As to what leases and what wells are referred to in paragraph V of the complaint. Defendant should be informed specifically of the following matters concerning the alleged leases and the wells allegedly drilled thereon:

A. The names of the "various persons and corporations" to which each alleged lease has been granted.

B. The date of the making of each alleged lease.

C. The location of the alleged lease or leases.

D. The location of the alleged wells drilled and producing petroleum, gas, or other hydrocarbon substances in violation of the rights of the United States.

Without this specification in the complaint, defendant cannot know from which particular leases allegedly made by it "substantial sums of money" are alleged to have been paid to it "in violation of the rights of" the plaintiff. Here again, defendant must be furnished with the ultimate facts concerning the specific leases and wells and their location in order to frame a responsive pleading either admitting or denying the plaintiff's allegations. Defendant may admit that some of the leases and wells are within the area described in the complaint. Others, because they are within what defendant claims as inland waters or above low-water mark, defendant will deny are included within the area. Since recovery of moneys received from these leases and wells is sought from defendant in this complaint, every consideration of fairness to defendant in enabling it to prepare for trial and to take advantage of available defenses requires such specification.

XII

As to what moneys are intended to be included in the phrase "all sums of money derived by it from the

area" in the prayer in paragraph VII of the complaint. Specifically, the defendant should and must be informed of the extent of the relief sought by the plaintiff in the following respects:

A. Whether the plaintiff seeks to claim all of the moneys received by the State of Texas from the area described in the complaint since June 23, 1947.

B. If the plaintiff does not seek to claim all of the moneys received by the State of Texas from the area described in the complaint since June 23, 1947, which of the following it does seek to claim:

1. The moneys received from the leasing of oil or gas or other mineral rights.
2. The moneys received from the leasing of oyster beds.
3. The moneys received from the sale, removal, or use of sand, gravel, shell, or other non-mineral substances.
4. The moneys received from the collection of taxes on property built upon, in, or over such land.
5. The moneys received from grants of the privilege of carrying on geophysical operations.
6. The moneys received from the lease of lands (below low-tide) for playgrounds or surf bathing.
7. The moneys received from the sale of lands for the erection of docks, wharves, piers, and other marine structures.
8. The moneys received from the sale of land for the purpose of filling to extend the shoreline of the coast of Texas.

9. The moneys received for submerged lands sold to or condemned by the United States.
10. The moneys received from fishing licenses and fisheries.
11. The moneys received from any source other than those enumerated above.

If the plaintiff seeks to claim the moneys from any one or more of the above sources, then defendant is entitled to know the precise area from which the moneys are alleged to have been received; the character, the date, and the amount of the alleged payments; and the names of the parties making such payments.

C. Whether the plaintiff seeks to claim all of the moneys received from the sources in "B" above, regardless of the date the State of Texas granted or sold such right or privilege, or whether it seeks the moneys received from these sources only in the cases where such right or privilege was granted or sold by the State of Texas after June 23, 1947.

It is necessary that the defendant know the items, the dates, and the amounts for which the plaintiff seeks to require it to account before it properly can prepare a responsive pleading.

---

The defendant represents that the specification and particularization in the above-indicated respects, sought by this motion for a more definite statement or for a bill of particulars, is needed to enable it properly to frame its responsive pleading and pre-

pare for trial and be in a position to take advantage of all defenses available to it.

Wherefore, this defendant prays that an order be entered directing that plaintiff amplify its complaint by filing a more definite statement or a bill of particulars with respect to the matters above mentioned, and that defendant's time to answer or otherwise plead be extended until sixty (60) days after the filing by the plaintiff of a more definite statement or a bill of particulars.

Respectfully submitted,

PRICE DANIEL
Attorney General of Texas

J. CHRYS DOUGHERTY
Assistant Attorney General

JESSE P. LUTON, JR.
Assistant Attorney General

K. BERT WATSON
Assistant Attorney General

August, 1949.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948

No. 14, Original

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

## MOTION FOR EXTENSION OF TIME TO ANSWER OR OTHERWISE PLEAD

Comes now the State of Texas, defendant in the above-entitled cause, by its Attorney General, and, subject to its motion to dismiss, represents to the Court as follows:

This defendant is filing herewith a motion to require plaintiff to amplify its complaint with a more definite statement or a bill of particulars so that defendant may be enabled to prepare a responsive pleading in answer to the complaint, and, for the reasons set forth in said motion, the defendant is unable to make an adequate, informative, and properly responsive answer or otherwise plead to the

said complaint unless and until the said complaint has been amplified and clarified by a more definite statement or a bill of particulars, as requested in said motion.

Wherefore, the defendant respectfully moves that the Court enter an order extending the time within which the defendant may file an answer or otherwise plead until sixty (60) days after the filing by plaintiff of a more definite statement or a bill of particulars as requested in defendant's motion, or, in the event the Court should deny this motion to require plaintiff to file a more definite statement or bill of particulars, then defendant respectfully moves that the Court enter an order extending the time within which this defendant may file an answer or otherwise plead until thirty (30) days after the date on which the Court refuses to grant the motion for more definite statement or bill of particulars.

Respectfully submitted,

PRICE DANIEL
Attorney General of Texas

J. CHRYS DOUGHERTY
Assistant Attorney General

JESSE P. LUTON, JR.
Assistant Attorney General

K. BERT WATSON
Assistant Attorney General

August, 1949.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948

No. ~~14~~ 13, Original

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

## MOTION OF THE STATE OF TEXAS TO DISMISS THE COMPLAINT OF THE UNITED STATES OF AMERICA

PRICE DANIEL
Attorney General of Texas
J. CHRYS DOUGHERTY
Assistant Attorney General
JESSE P. LUTON, JR.
Assistant Attorney General
K. BERT WATSON
Assistant Attorney General

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948

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No. 14, Original

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UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

---

## MOTION FOR LEAVE TO FILE

The State of Texas, by its Attorney General, asks leave of the Court to file its motion to dismiss the complaint filed herein by the United States of America.

PRICE DANIEL
Attorney General of Texas

## MOTION TO DISMISS

Now comes the State of Texas, the defendant, by its Attorney General, and moves the Court to dismiss the complaint filed herein on the ground that it appears on the face of the complaint that this is a controversy between the United States and a State, and as such is not within the original jurisdiction of this Court under Article III, Section 2, Clause 2, of the Constitution of the United States.

## STATEMENT IN SUPPORT OF MOTION

Under Article III, Section 2, Clause 1, of the Constitution, the judicial power of the United States extends, among other things, to all cases in law and equity arising under the Constitution and laws of the United States and treaties made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; and to controversies between two or more States, between a State and citizens of another State, and between a State and foreign states, citizens, and subjects. Article III, Section 2, Clause 2, provides that in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned Clause 2 provides that the Supreme Court shall have appellate jurisdiction.

The first clause of Article III, Section 2, defines the types of cases to which the judicial power of the United States extends. The second clause of this section merely distributes the original and appellate jurisdiction of this Court and does not confer any new class of jurisdiction. *Louisiana v. Texas*, 176 U.S. 1, 16 (1900); *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939); *Minnesota v. Hitchcock*, 185 U.S. 373, 383 (1902); *Duhne v. New Jersey*, 251 U.S. 311 (1920); *California v. Southern Pacific Co.*, 157 U.S. 229, 257 (1895). This being true, Clause 2 must be read in connection with Clause 1.

Only two of the categories of cases in Clause 1 are declared by Clause 2 to be within the original jurisdiction of this Court, namely, those affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party. It is on the latter category that plaintiff must rely for its claim that this case is one coming within the original jurisdiction of this Court, because Clause 2 does not profess to confer on this Court original jurisdiction of the category in Clause 1 covering cases in which the United States shall be a party.

At first glance it may appear that Clause 2 gives this Court jurisdiction of all cases to which a State is a party. However, when Clause 2 is considered in connection with Clause 1, it becomes apparent that the cases declared to be within the original jurisdiction of this Court when a State is a party are those cases enumerated in Clause 1 in which a State is listed as a party, namely, "Controversies between two or more States"; between a State and citizens of another State; and between a State and foreign

states, citizens, and subjects. Thus construed, Clause 2 does not confer original jurisdiction upon this Court in cases between the United States and a State, since controversies to which the United States is a party are one of the categories of cases enumerated in Clause 1 which are not taken out and declared to be cases of which the Supreme Court shall have original jurisdiction. "The rule of construction of the Constitution being, that affirmative words in the Constitution, declaring in what cases the Supreme Court shall have original jurisdiction, must be construed negatively as to all other cases." *Ex parte Vallandigham*, 1 Wall. 243, 252 (U.S. 1863); *Cohens v. Virginia*, 6 Wheat. 264, 397-398 (U.S. 1821); *Marbury v. Madison*, 1 Cranch 137, 174-175 (U.S. 1803).

The Attorney General of the United States recognized that this Court is not empowered by the Constitution to entertain an original suit between the United States and a State in his argument on a motion to intervene in behalf of the United States in *Florida v. Georgia*, 17 How. 478 (U.S. 1855). Although the majority of the Court in that case did not deem it necessary to examine or decide this question, the dissenting opinions of Mr. Justice Curtis and Mr. Justice Campbell, the former being concurred in by Mr. Justice McLean, recognized that this Court does not have original jurisdiction of a suit between the United States and a State. Mr. Justice Curtis said:

> "The judicial power of the United States extends, among other things, to controversies to which the United States shall be a party—to

controversies between two or more States—between a State and citizens of other States or of foreign states, where the State commences the suit, and between a State and foreign states.

"In distributing this jurisdiction, the constitution has provided that, in all cases in which a State shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate jurisdiction. One of the other cases before mentioned, is a controversy to which the United States is a party.

"I am not aware that any doubt has even been entertained by any one, that controversies to which the United States are a party, come under the appellate jurisdiction of this court in this distribution of jurisdiction by the constitution. Such is the clear meaning of the words of the constitution. So it was construed by the congress, in the judiciary act of 1789, which, by the 11th section, conferred on the circuit courts jurisdiction of cases in which the United States are plaintiffs, and so it has been administered to this day.

"There was a case of the United States v. Yale Todd, commenced in this court in 1794, which is not reported, but it is stated from the record, by Mr. Chief Justice Taney, in a note to the case of the United States v. Ferreira, 13 How. 52. Of this case the note says:—

" 'The case of Yale Todd was docketed by consent in the supreme court, and the court appears to have been of opinion that the act of congress of 1793, directing the secretary of war and the attorney-general to take their opinion upon the question, gave them original jurisdiction. In the early days of the government, the right of congress to give original jurisdiction to the su-

preme court, in cases not enumerated in the constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided Todd's case. But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the constitution, and that congress cannot enlarge it. In all other cases its power must be appellate.'

"The decision of this court, in Marbury v. Madison, 1 Cranch, 137, settled this construction of the constitution; and, as stated in this note, no one who has examined the subject now questions it.

"We have, then, two rules given by the constitution. The one that if a State be a party, this court shall have original jurisdiction; the other, that if the United States be a party, this court shall have only appellate jurisdiction. And we are as clearly prohibited from taking original jurisdiction of a controversy to which the United States is a party, as we are commanded to take it if a State be a party. Yet, when the United States shall have been admitted on this record to become a party to this controversy, both a State and the United States will be parties to the same controversy. And if each of these clauses of the constitution is to have its literal effect the one would require and the other prohibit us from taking jurisdiction.

"It is not to be admitted that there is any real conflict between these clauses of the constitution, and our plain duty is so to construe them that each may have its just and full effect. This is attended with no real difficulty. When, after

enumerating the several distinct classes of cases and controversies to which the judicial power of the United States shall extend, the constitution proceeds to distribute that power between the supreme and inferior courts, it must be understood as referring, throughout, to the classes of cases before enumerated, as distinct from each other.

"And when it says: 'in all cases in which a State shall be a party, the supreme court shall have original jurisdiction,' it means, in all the cases before enumerated in which a State shall be a party. Indeed, it says so, in express terms, when it speaks of the other cases where appellate jurisdiction is given.

"So that this original jurisdiction, which depends solely on the character of the parties, is confined to the cases in which are those enumerated parties, and those only." (17 How. at 504-506.)

The language of Mr. Justice Campbell's opinion is as follows:

"The nature of the jurisdiction in regard to the States having been considered, the inquiry can now be made, can the United States be a party to a suit between two or more States? The constitution does not mention such a case. There were before the federal convention propositions to extend the judicial powers to questions 'which involve the national peace and harmony;' 'to controversies between the United States and an individual State;' and in the modified form, 'to examine into and decide upon the claims of the United States and an individual State to territory.' None were incorporated into the consti-

tution, and the last was peremptorily rejected. The jurisdiction of this court over cases to which the United States and the States are respectively parties, is materially different—the one original, the other appellate only. There was no encouragement, nor serious countenance, to the proposition to vest this court with jurisdiction of such cases. This court is organized and its members appointed by one of the parties. Their influence extends with the jurisdiction of this court, their means of reputation with its powers, their habitual connection with the federal legislation naturally inspires a sentiment in favor of the federal authority. These operative causes of bias were known; and apprehensive as the States were of consolidation and the overbearing influence of the central government, we can well understand why only the modified proposal as to jurisdiction was pressed to a vote. I repeat, that the enumeration of the parties in this article of the constitution did not enlarge the liabilities of the States to suits, but it only provided tribunals where suits might be brought, to which they were already subject, or might desire to commence. Nor does the clause authorizing suits between two or more States afford any contradiction to this conclusion.

"The articles of confederation, by which they were then combined, allowed congress, as the occasion might arise, to appoint special tribunals 'to which all disputes and differences now subsisting, or that might hereafter arise, between two or more States, concerning boundary, jurisdiction, or any other cause whatever,' should be submitted.

"Similar provisions for special and occasional tribunals, in matters of jurisdiction and boundary, formed a part of the plan of the constitution

till near the close of the convention, when they were stricken out, and the general jurisdiction over those as well as other controversies delegated to this court. My conclusion, after an examination of the clause, is, that it is only in controversies between the States that one of their number can be impleaded in this court without its explicit consent; and that this jurisdiction is special, as to the controversy and the parties, embracing none except those between the States of the Union; that the court has no original jurisdiction of the United States, and none of a controversy between them and an individual State; and consequently, that they have no title to appear as a party to the record, nor in any undefined and uncertain relation to it." (17 How. at 521-522.)

While it is true that the majority of the Court in *United States v. Texas*, 143 U.S. 621 (1892), declared that the original jurisdiction of this Court extends to a suit between the United States and a State, the dissenting opinion of Mr. Chief Justice Fuller, with which Mr. Justice Lamar concurred, adhered to the view that this type of suit is not within the original jurisdiction of the Supreme Court. In that opinion Mr. Chief Justice Fuller said:

"This court has original jurisdiction of two classes of cases only, those affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party.

"The judicial power extends to 'controversies between two or more States;' 'between a State and citizens of another State;' and 'between a

State or the citizens thereof, and foreign States, citizens or subjects.' Our original jurisdiction, which depends solely upon the character of the parties, is confined to the cases enumerated, in which a State may be a party, and this is not one of them.

"The judicial power also extends to controversies to which the United States shall be a party, but such controversies are not included in the grant of original jurisdiction. To the controversy here the United States is a party.

"We are of opinion, therefore, that this case is not within the original jurisdiction of the Court." (143 U.S. at 648-649.)

The dissenting opinion in the above case was consistent with all that had been written on this question up to that time and with the proceedings concerning this question in the Constitutional Convention of 1787, where efforts to give this Court original jurisdiction of controversies between the United States and a State were defeated. (See 1 Elliott's Debates 177, 180, 275-276; III Madison Papers 1366, 1399, 1465-1466.)

We respectfully submit that the opinion of the Court in *United States v. Texas*, *supra*, is in error in its construction of Clause 2 of Article III, Section 2, of the Constitution, and that it and the subsequent cases relying on it in this respect should be overruled.

Section 1251(b)(2) of Title 28 of the United States Code provides that the Supreme Court shall have original jurisdiction over "all controversies between the United States and a State." However, this attempt by the Congress to confer original

jurisdiction upon this Court of cases which are declared by the Constitution to be only within the appellate jurisdiction of this Court is invalid, for it has long been the established doctrine that the original jurisdiction of this Court cannot be enlarged by the Congress. *Cohens v. Virginia*, 6 Wheat. 264, 399 (U.S. 1821); *Marbury v. Madison*, 1 Cranch 137, 174-175 (U.S. 1803); *United States v. Ferreira*, 13 How. 40, 53 (U.S. 1851); *Baltimore and Ohio Ry. v. Interstate Commerce Commission*, 215 U.S. 216 (1909); *Ex parte Yerger*, 8 Wall. 85, 98 (U.S. 1868); *California v. Southern Pacific Co.*, 157 U.S. 229, 261 (1895).

It is respectfully submitted, therefore, that the motion to dismiss the complaint, for the reason that this is not a case coming within the original jurisdiction of this Court under Article III, Section 2, Clause 2, of the Constitution, should be granted.

Respectfully submitted,

PRICE DANIEL
Attorney General of Texas

J. CHRYS DOUGHERTY
Assistant Attorney General

JESSE P. LUTEN, JR.
Assistant Attorney General

K. BERT WATSON
Assistant Attorney General

August, 1949.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1951

No. ~~14~~ 13, Original

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

## REPLY IN OPPOSITION TO MOTION FOR JUDGMENT

PRICE DANIEL
Attorney General of Texas
J. CHRYS DOUGHERTY
JESSE P. LUTON, JR.
K. BERT WATSON
DOW HEARD
Assistant Attorneys General

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

No. 14, Original

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

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## MOTION FOR LEAVE TO FILE

The State of Texas, by its Attorney General, asks leave of the Court to file its reply to the motion for judgment filed herein by the United States of America on September 27, 1949.

PRICE DANIEL
Attorney General of Texas

## REPLY IN OPPOSITION TO MOTION FOR JUDGMENT

### *Preliminary Statement*

As we understand it, the basis of the motion of the United States, filed herein on September 27, 1949, is that the State should be proceeded against summarily because it filed motions to dismiss and for more definite statement or bill of particulars instead of answering to the merits of the controversy before the return day, September 1, 1949.[1] Admitting that the defendant is "not . . . technically in default"[2] in failing to answer, plaintiff contends the State should nevertheless be denied the right to answer to the merits. Thus the plaintiff asks an early argument on the "issues raised" by the complaint alone.

This request for such drastic action under these circumstances is unparalleled in the history of original proceedings in this Court. Counsel for the State of Texas, having searched every original proceeding hitherto entertained by this Court, have found no instance in which the Court has been importuned in this way to foreclose the defendant's right to proceed in an orderly manner in accordance with customary and orthodox rules of pleading.

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[1] The order of the Court granting plaintiff leave to file was in the following terms:

> "The motions for leave to file complaints are granted and process is ordered to issue returnable on or before September 1, next." 17 *U.S.L. Week* 3341 (U.S. May 17, 1949).

[2] Plaintiff's Motion for Judgment, p. 3.

Plaintiff's motion erroneously assumes that the defendant is not entitled to file motions to dismiss and for more definite statement or bill of particulars, instead of an answer to the merits, on the return day. No authority is cited for this assumption. We think that the authorities are unanimously to the contrary. The right of a litigant in an original proceeding to follow the customary practice of directing preliminary motions to the sufficiency of the complaint before answering to the merits has long been recognized by this Court.[2]

No motion for rehearing was filed in the present case after the decision of the Court granting leave to file, because the State of Texas thought that the objections presented by it had received adequate hearing in that preliminary stage of the proceeding. Thereafter, on August 27, 1949, prior to the return date fixed by the Court, the defendant filed its motion to dismiss the complaint on the ground that the allegations of the bill did not place it within the original jurisdiction of this Court under Article III, Section 2, Clause 2 of the Constitution. As hereinafter shown, this specific ground had not been raised in any previous written objection either by Texas or by Louisiana. Subject to this motion, defendant on the same day also moved for a more definite statement or a bill of particulars on the ground that the complaint was so indefinite and uncertain that defendant could not frame its responsive pleadings;

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[2] *New Jersey v. New York*, 6 Pet. 323 (1832); *Louisiana v. Texas*, 176 U.S. 1 (1900); *Georgia v. Pennsylvania Ry.*, 324 U.S. 439 (1945); *see: Rhode Island v. Massachusetts*, 15 Pet. 233, 272 (1841).

prepare for trial, or take advantage of the defenses which might be available to it. The customary motion for an extension of time was made in connection with the latter motion.

For the reasons hereinafter stated, it is respectfully submitted that these motions were properly presented, that they were filed in good faith and not for purposes of delay, and that in filing them defendant was entirely within its rights as a litigant in this Court.

*Defendant's Motion to Dismiss*

The United States apparently has confused the ground of the motion of the State of Texas to dismiss the complaint with the ground relied upon by the State of Louisiana in its objections to granting leave to file. The nature of the objection of Louisiana was that Louisiana, being a sovereign State, must give its consent to be sued, and not having given its consent in that case, the Court had "no jurisdiction over the State of Louisiana for purposes of this suit."[1] That objection rested upon a basis entirely different from that of the motion to dismiss filed by the State of Texas. The basis of the latter is that this Court does not have original jurisdiction over a controversy between the United States and a State under Article III, Section 2, of the Constitution, this type of case not being one of the categories of cases declared by

[1] Objections to Motion for Leave to File Complaint by the United States against State of Louisiana, No. 13, Original, October Term, 1948, p. 2.

Article III, Section 2, Clause 2, to be within the original jurisdiction of this Court.

Although in the oral argument on motion for leave to file the complaint Louisiana touched on this latter objection, the specific objection was not raised in any written argument by either State prior to the motion to dismiss by Texas. This precise question was raised for the first time by certain members of the Court during oral argument of the *Louisiana* case and they evinced considerable interest concerning it.

The action of the Court in granting leave to file the complaint against Texas did not clearly indicate that the Court had no doubts about its jurisdiction in this type of case. The Court merely entered an order granting leave to file without a written opinion relating to its jurisdiction. This was interpreted by the State of Texas, reasonably we believe, as meaning that the Court would pass upon objections to jurisdiction interposed by motion to dismiss after leave to file had been granted. This has been the practice of the Court in a number of cases. For example, in *Louisiana v. Texas*, 176 U.S. 1 (1900), "argument was had on objections to granting leave, but it appearing to the court the better course in this instance, leave was granted, whereupon defendants demurred, and the cause was submitted on the oral argument already had and printed briefs."[3] The Court in that case sustained the demurrer and dismissed the bill.

In *Washington v. Northern Securities Co.*, 185 U.S. 254 (1902), notice was given to the proposed defendants and argument was had in support of and

[3] 176 U.S. at 2.

against the motion for leave to file the complaint. The Court, in granting leave, said:

> "... among other objections to granting leave, it is urged that the court would have no jurisdiction over the subject-matter because, as contended, the bill does not present the case of a controversy of a civil nature, which is justiciable under the Constitution and laws of the United States, in that the suit is purely a suit for the enforcement of 'the local law and policy of a sovereign and independent State, whose right to make laws and to enforce them exists only within itself and by means of its own agencies, and is limited to its own territory.'
>
> "In the exercise of original jurisdiction the court has always necessarily proceeded with the utmost care and deliberation, and, in respect of all contested questions, on the fullest argument; and in the matter of practice we are obliged to bear in mind, in an especial degree, the effect of every step taken in the instant case on those which may succeed it. In view of this it seems to us advisable to take the same course on the pending application as was pursued in *Louisiana v. Texas*, that is, without intimating any opinion whatever on the questions suggested, to grant leave to file in accordance with the usual practice."[1]

We think that the above reasoning conclusively demonstrates that the State of Texas acted in good faith and within its rights as a litigant in filing its motion to dismiss. It is to be noted that no extension of time to answer was requested in connection

[1] 185 U.S. at 256.

with the motion to dismiss, and plaintiff is not warranted in charging that it was "filed for purposes of delay."

*Defendant's Motion for More Definite Statement*

Subject to its motion to dismiss, the defendant filed a motion for a more definite statement of the nature and extent of the claim of the United States. Its right to do so is securely founded in both English and American equity practice and is expressly recognized in Rule 12(e) of the Federal Rules of Civil Procedure.[1] Although this Court has not adopted detailed rules governing its procedure in cases on the original

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[1]Rule 12(e) provides that "if a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading."

This Rule is a continuation in revised form of old Federal Equity Rule 20, which provided that "a further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just."

Old Equity Rule 20 of the Federal Equity Rules was in turn derived from, and was in fact almost identical with, one of the English "Rules of the Supreme Court, 1883," adopted under the Judicature Act of 1873 (Statutory Rules and Orders Revised Dec. 31, 1903, Supreme Court, Eng., 1904). This was Rule 7, Order XIX, which provided as follows: "A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just." These rules were applicable in the High Court of Justice, which included both the Chancery Division and the King's Bench Division. See cases cited, *post*, p. 14.

docket, it has followed, by analogy, the Federal Rules of Civil Procedure when appropriate. This was conceded by the United States in *United States v. California*, where the plaintiff said that "although the Federal Rules of Civil Procedure are not controlling, they nevertheless furnish a sound guide for all proceeding throughout the Federal judicial system."[8]

The State of Texas, by specific analogy to Rule 12(e) of these Rules, has here moved for a more definite statement. A similar motion in *Georgia v. Pennsylvania Ry.* was recognized and accepted as entirely proper in that original action and was in part granted by this Court. There is a striking similarity between the accepted procedure in that case and the procedure followed by defendant in this case. In that case, rule to show cause why leave to file the amended bill of complaint should not be granted was issued by this Court.[10] Argument was had on the rule, and in a written opinion this Court granted leave to file.[11] Process was issued, returnable May 28, 1945. Instead of answering to the merits, the defendant railroads, on May 26, filed motions for more definite statement or bill of particulars. These motions were granted in part, the Court ordering the bill of particulars to be served and filed on or before August 15, 1945, and extending defendant's time to answer the complaint to October 1, 1945.[12] The State

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[8]Memorandum in Support of Motion to Strike Answer, United States v. California, No. 12, Original, October Term, 1945, pp. 8-9.

[9]324 U.S. at 439 (1945).

[10]65 S. Ct. 110 (1944).

[11]324 U.S. 439 (1945).

[12]65 S. Ct. 1560 (1945).

of Texas is asking no more in this case than the Court properly granted to the defendant railroads in *Georgia v. Pennsylvania Ry.* The Court there followed the practice of the Federal district courts under similar circumstances.

In *Blanton v. Pacific Mutual Life Ins. Co.*,[15] the Court said:

> "I understand the effect of the rule to be that where a party is required or permitted to file a response (such as an answer) to a pleading previously filed and desires a bill of particulars as to the allegations of the previous pleading, the motion for the bill of particulars must be made before he files his response. . . . The time within which a party is required to answer determines the time within which he may move for a bill of particulars. . . . In other words, if the defendant had the right to answer at any time up until May 31st, it had the right to do anything else which the rules permit to be done previous to answering."

And this Court in *New Jersey v. New York*,[16] in holding that a demurrer (which at that time served the purpose of a motion for a bill of particulars) was regularly filed, said:

> "The demurrer, then, being admitted as containing an appearance by the State, the court is of opinion that it amounts to a compliance with the order at the last term. In that order, the word 'answer,' is not used in a technical

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[15] 8 Fed. Rules Serv. 6b.51, Case 1; 4 F.R.D. 200 (W.D. N. C. 1944); app. dism. 146 F. 2d 725 (W.D. N. C. 1944).

[16] 6 Pet. 323 (1832).

sense, as an answer to the charges in the bill under oath; but an answer, in a more general sense, to the bill. A demurrer is an answer in law to the bill, though not in a technical sense an answer according to the common language of practice."

The right of defendant in a proper case to move for more definite statement of plaintiff's allegations before answering to the merits being clear, it only remains to determine whether the motion of the defendant in this case is, as the United States claims, "insubstantial and frivolous" and is therefore interposed merely "to achieve further delay."[15]

The complaint in the present case is, as the United States says, "patterned closely after the Complaint filed in *United States v. California*,"[16] —so closely, in fact, that, so far as the principal allegations are concerned, only a word here and there has been changed. The re-presentation of the California complaint without regard to the effect of the subsequent decision in that case on the possible issues in the present case, has produced allegations which are vague, uncertain and indefinite as to the State of Texas. Particularly is this true when the special historical claim of Texas is considered.

The plaintiff has failed to take into account the fact that the decision actually rendered by the Court in the *California* case did not hold that the United States "owned" the disputed land, but said only that the United States had certain paramount rights and powers over the area, the scope of which rights and

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[15]Motion for Judgment, p. 4.
[16]*Ibid.*

powers were not so clearly defined in the opinion as to be automatically applicable to the distinguishable case against Texas. The complaint as to ownership and paramount rights and powers claimed as to the Texas area is therefore much broader than the Court's decision relating to the California area. As aptly remarked by Judge Brown in *Curtis v. Metcalf*,[17] "no mode of pleading is just to a defendant which charges him with more than is intended to be proved against him."

It is the breadth of possible controversy under the allegations of the complaint viewed in present perspective that defendant has sought to circumscribe so that clear, distinct and succinct issues will be presented for the Court's determination.

The necessity for such delimitation of the area of controversy has long been recognized both in England and the United States. As said by Cotton, L. J., in *Spedding v. Fitzpatrick*, 38 Ch. D. 410, 413 (1888):

> "The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise."[18]

In stating that "none of the matters called for by the State is essential to the adjudication of the basic issues in this case on the merits,"[19] plaintiff has

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[17]265 F. 293, 296 (D. R.I. 1918).

[18]Quoted with approval by District Judge Trieber in *United States v. United Shoe Machinery Co.*, 234 F. 127, 138 (E.D. Mo. 1916).

[19]Motion for Judgment, p. 4.

suggested an improper test of the sufficiency of the complaint as against a motion for more definite statement. The correct test is not whether the complaint, in the absence of objection, is sufficient to support a judgment but rather whether the complaint is sufficient, over objection, to apprise the defendant with definiteness and particularity concerning the case it must meet at the trial and hence to enable it properly "to frame a responsive pleading."[1] In order fairly to protect its interests by its pleading, defendant must be in a position to take advantage of all available defenses. In *Walling v. West Virginia Pulp & Paper Co.*,[2] the Court said:

> "It cannot be overlooked that *a primary function of a bill of particulars is to furnish relevant details in amplification of a pleading, to avoid surprise, narrow the controversy and expedite the trial:*
>
> ". . . A complaint might be drawn with such generality of expression as to comprehend a dozen or a hundred transactions, all within the knowledge of the defendant, but that would not deprive the defendant of the right to know which one or more of the possible transactions the plaintiff bona fide referred to and intended to rely upon. It is hardly reasonable to believe that the rules were intended to put a responsive pleader to a distinct disadvantage, to force him to plead in ignorance of what was intended by his adversary, and then resort to the cumbersome methods of discovery, depositions or interrogatories to ascertain what factual and legal

[1] Rule 12(e), Rules of Civil Procedure.
[2] 2 F.R.D. 416, 419-421 (E.D. S.C. 1942).

issues he would be called upon to meet on the trial of the case.

". . . True, the defendant can answer by saying that it has no knowledge or sufficient information to form a belief as to the truth of the allegations made, but what of it? Is it not entitled to know what it is to meet in court before trial time arrives? *Is it not entitled to frame its answer in contemplation of the issues the plaintiff intends tendering? And what is the objection to informing the defendant just what the controversy is about?* Why deny the potency of Rule 12(e), and force the defendant to resort to more cumbersome and less expeditious methods to ascertain what he is to be called upon to answer for?" (Emphasis supplied.)

To the same effect is *United States v. Griffith Amusement Co.*,[1] where it was said:

"This rule has to do with the pleadings alone, and the purpose of the bill of particulars is to make the petition sufficiently definite to enable a defendant to know what he or it is alleged to have done. It is no defense, therefore, to a motion for a bill of particulars to say that the information which the defendants seek is within their knowledge. A demurrer or a motion to dismiss might be good as against a complaint and whether or not a complaint states a cause of action is to be determined by its contents and not by what the defendants may know. The complaint is the basis of the action and from it the court must determine whether or not a cause or causes of action are actually stated."

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[1] 1 F.R.D. 229, 231 (W.D. Okla. 1940).

A further and most important purpose of a motion for more definite statement from the point of view of fairly and expeditiously conducted litigation is pointed out in *McComb v. Hardy:*

> "Moreover, such general averments do not permit the elimination through the answer of any important factual issues. The defendants cannot make the admissions which they might readily be willing to make if they were apprised of specific charges."

The desire of the defendant in this case to narrow the issues by appropriate admissions wherever possible is made one of the bases of its requests for more definite statement.[24]

It is not surprising that, where the necessity for their use arises, such motions are considered entirely proper in English and American practice. They fill a gap which the most abbreviated system of pleading cannot ignore. Thus under the English Rule[25] as well as under Equity Rule 20 of the Federal Equity Rules,[26] the courts have required a pleader

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[23]11 Fed. Rules Serv. 12e.244, Case 1; 8 F.R.D. 28 (E.D. Va. 1948).

[24]Motion for More Definite Statement or Bill of Particulars, pp. 8 and 19.

[25]Examples under the English Rule are to be found in the following: *Blackie v. Osmaston*, 28 Ch.D. 119 (1884); *Newport Slipway Drydock and Engineering Co. v. Paynter*, 34 Ch. D. 88 (1886); *Spedding v. Fitzpatrick, ante.*

[26]Examples under old Federal Equity Rule 20, including cases under the anti-trust laws, may be found in the following: *Locker v. American Tobacco Co.*, 194 F. 232, 200 F. 973 (S.D. N.Y. 1912); *Patterson v. Corn Exchange of Buffalo*, 197 F. 686 (W.D. N.Y. 1912); *Williams v. Pope*, 215 F. 1000 (W.D. N.Y. 1914); *Whitaker v. Whitaker Iron Co.*,

to amplify with a further and better statement or bill of particulars, whenever it appeared the pleading did not allege facts with sufficient particularity to enable the opposing party to know what case he had to meet and to plead responsively or otherwise prepare to meet that case.

Similar practice has been regarded as correct under the express provisions of Rule 12(e) of the Rules of Civil Procedure.[27] Thus the motion for more definite statement seeks to achieve that clarity, distinctness and succinctness of issues which is the basic purpose of orderly pleading.

That such was its purpose, irrespective of the identity of the parties, was clearly recognized and strongly urged by the Government in the *California* case. The Memorandum in Support of Motion to Strike Answer said in part:[28]

> "The Court has apparently had little occasion to pass on the matter of improper pleadings in original cases. However in other cases before it, the Court has left no doubt as to its rules in regard to this subject. In *McFaul v. Ramsey*, 20 How. 523, 524, it was declared that plead-

238 F. 980 (N.D. W. Va. 1916); *St. Louis Car Co. v. J. G. Brill Co.*, 249 F. 502 (E.D. Pa. 1918); *Curtis v. Metcalf*, 265 F. 293 (D. R. I. 1918); *Universal Oil Products Co. v. Skelly Oil Co.*, 12 F. 2d 271 (D. Del. 1926); *Harry Prochaska, Inc. v. Consolidated Lithographing Corp.*, 51 F. 2d 362 (S. D. N. Y. 1931); *Stanley Co. of America v. American Telephone & Telegraph Co.*, 5 F. Supp. 380 (D. Del. 1933).

[27] *Faske v. Radhill*, 9 Fed. Rules Serv. 6b.12, Case 1 (E.D. Pa. 1946); *F. E. Myers & Bros. Co. v. Goulds Pumps, Inc.*, 10 Fed. Rules Serv. 15a.21, Case 6, 7 F.R.D. 416 (W.D. N.Y. 1947); *McComb v. Hardy*, 11 Fed. Rules Serv. 12c.244, Case 1, 8 F.R.D. 28 (E.D. Va. 1948).

[28] At p. 6.

> ings should clearly, distinctly and succinctly state the nature of the wrong complained of, the remedy sought and the defense set up. The end proposed is to bring the matter of litigation to one or more points simple and unambiguous.'"

The motion for more definite statement in this case was filed in accordance with these well-recognized canons of orderly pleading and within the spirit and intent of the Federal Rules of Civil Procedure. The carefully stated reasons (following each request for more definite statement) for desiring the requested particulars negate any desire on the part of defendant to delay unnecessarily the decision of the present matter. We believe our former statement of these reasons in the motion for more definite statement or bill of particulars, to which we now call attention, is clear and that they need not here be repeated. Plaintiff's characterization of this motion as "insubstantial and frivolous" either overlooks or ignores the validity of the reasons there given. It is respectfully submitted that the defendant's motion fairly calls for a more direct and specific response. Indeed the filing of a motion for judgment, rather than a request that the motion for more definite statement or bill of particulars be denied, strongly indicates that plaintiff could find no valid reason why the motion of the defendant should not be granted. If any objections were available, the resort to a motion invoking the drastic remedy of judgment without permitting the defendants to answer appears intemperate in the extreme.

Plaintiff's suggestion that the same objections to the language of the complaint here raised were interposed in the *California* case completely ignores the distinction between that case and the present one. In the *California* case, the State of California filed no motion for more definite statement or bill of particulars. Instead it filed an exhaustive answer in response to the complaint. In paragraph II of this answer the State alleged that it could not determine the meaning of certain allegations in the complaint, but it immediately followed these allegations with a denial and affirmative defenses thus traversing all of the allegations of the complaint. The same allegations as to indefiniteness, followed by denials and defenses, appeared in the shortened answer subsequently filed by California.[29] That the issues were then joined on the pleading was admitted by both parties.[30] The case was argued and decided upon motion for judgment on the pleadings.[31] In opposition to the motion for judgment California raised the question of the indefiniteness of the complaint only in connection with its argument that no case or controversy was presented under Article III. Sec-

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[29]Motion Pursuant to Pre-Trial Conference for Leave to File Answer and Answer, *United States v. California*, No. 12, Original, October Term, 1945, pp. 3-6.

[30]Brief of the State of California in Opposition to Motion to Strike Answer, p. 5. Motion Pursuant to Pre-Trial Conference for Leave to File Answer and Answer, *supra*, p. 2.

[31]Motion for Judgment filed June, 1946; *See:* Brief of the United States in Support of Motion for Judgment, California's Brief and Appendices in Opposition to the Motion for Judgment, and *United States v. California*, 332 U.S. 19 (1947).

tion 2, of the Constitution.[32] The language which plaintiff quotes from the opinion of the Court[33] was addressed to that point only, the Court merely deciding that the objection of indefiniteness "presents no insuperable obstacle *to the exercise of the highly important jurisdiction*" of the Court. (Emphasis supplied.)

Here a much earlier state of pleadings is in question. Defendant has not answered. Indeed, it has moved for a more definite statement of plaintiff's claim in order to permit it to narrow the issues to be heard by the Court.[34] The question is thus not one of jurisdiction but rather as to the right of the defendant to attack by proper and timely motion the sufficiency of the complaint to apprise the defendant of the precise allegations which it must admit or deny and which it must prepare to meet at the trial. On this question the *California* case is therefore not in point.

The suggestion that Texas should be charged with notice of and be bound by what occurs in the case of Louisiana is nothing more than an attempt to confuse distinct situations arising from different orders of the Court. The State of Texas was served with process returnable on a certain day. Under accepted standards of proper pleading, the State, prior to that time, filed an appropriate motion for more definite statement. For so doing, the State of Texas

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[32]Brief in Opposition to the Motion for Judgment, *United States v. California*, No. 12, Original, October Term, 1946, pp. 11-14. Appendices A to I of the same brief, pp. 12-31.

[33]Motion for Judgment, p. 5.

[34]*See: Third National Bank of Louisville v. Stone*, 174 U.S. 432, 434 (1899).

should not be penalized in so summary and drastic a fashion for doing what the lowliest litigant in the Federal Court is always entitled to do for the purpose of narrowing the issues before the Court.

With reference to plaintiff's charges of "delaying tactics," Texas would point out that plaintiff itself failed to file this suit for 17 months after the *California* decision and has not yet filed suit against 19 other coastal States to which the Justice Department claims the California decision is applicable. It ill-behooves the plaintiff to complain of necessary delay incident to customary pleading in the case against Texas while it is furnishing indefinite delay to other States which are daily using the resources of their submerged coastal areas.[39]

*Objections to the Form of Plaintiff's Motion*

Recognizing the great public importance of the present case, we have, in all of the foregoing discus-

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[38]Attorney General Clark (now Mr. Justice Clark) testified at the 1948 Joint Hearings: "It is my present intention to file a suit against every State that I think is affected by the decision. . . . We have a group of boys working on all the States. . . . I rather think that there is argument for saying that it applies to all of the coastal States of the United States." Joint Hearings Before the Committees on the Judiciary, 80th Cong., 2d Sess., on S. 1988 and Similar House Bills, February-March, 1948, pp. 616, 699, 703.

[39]See the testimony of various State representatives as to the natural resources being taken or used from the coastal submerged lands of their respective States. *Ibid.*, pp. 816-817, 1371 (Alabama), 401-402 (Delaware), 38 (Florida), 1045 (Maine), 428-429 (Maryland), 355 (Massachusetts), 93 (New Jersey), 99-100 (New York), 195 (North Carolina); 937-938 (Oregon), 359-360 (South Carolina), 800 (Washington).

sion, dealt with matters of substance rather than of form. However, with all justice it may be pointed out, that a motion for judgment in the form presented is improper at this time.

The plaintiff admits[a] and it is apparent from the foregoing argument that the defendant is not actually in default. Therefore a motion for judgment by default is not in order. Moreover, since only the pleadings are now before the Court, the "motion for judgment" must be intended as a motion for judgment on the pleadings.[b] Rule 12(c) of the Rules of Civil Procedure provides that such a motion may not be filed until after the pleadings are closed.

It is evident that the issues raised by the pleadings, if any, must be determined before the Court can render a decision on the merits. They cannot, as the plaintiff erroneously assumes, be raised by the complaint alone. The motions to dismiss and for more definite statement or bill of particulars not only do not determine the issues, but, on the contrary, raise preliminary objections to the jurisdiction of the Court and to the sufficiency of the complaint. They have here been seasonably filed and, according to plaintiff's own admission, defendant is not in default as a result. Thus the pleadings are not closed within the meaning of Rule 12(c) and no judgment on the

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[a] Statement with Respect to Motion for Judgment, pp. 3 and 5.

[b] Rule 12(c) "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." See *Interstate Commerce Commission v. Daley*, 26 F. Supp. 421 (D.C. Mass. 1939), where the Court held plaintiff is not entitled to a judgment on the pleading where an answer has not been filed.

pleadings is proper at this time. It follows that, in view of the entire circumstances of the present case, the granting of a motion for judgment or even the setting of such a motion for argument on the merits would be entirely improper at this time. Moreover, it would work a great injustice to the defendant.

In such a situation the rules of pleading must be applied so as to work injustice to neither litigant. As the United States so clearly argued in its Memorandum in Support of Motion to Strike Answer in the *California* case:

> "The circumstances that the answer in question has been filed by a State of the Union [or the United States] rather than by a private litigant in no sense requires a different result. To be sure there may be appropriate occasions for the relaxation of technical rules in favor of a sovereign where there is 'no injustice to the opposing' sovereign and where such relaxation 'but affords an additional opportunity to guard against the possibility of error.' *Virginia v. West Virginia*, 234 U.S. 117, 121. *But the situation herein involves more than mere technical rules. Far from being a safeguard against error the relaxation of accepted standards here will promote confusion that would enhance the 'possibility of error.'* Surely it is a matter of high public importance that the United States, no less than an individual state, *be not placed at a disadvantage in the conduct of its litigation;* and where such a serious departure from accepted standards on the part of the State [or the United States] threatens the orderly progress of this case, *there is no basis for the abandonment of such standard merely because one*

[1] At p. 8.

> *of the litigants is a State* [or the United States]. Particularly is it important that these standards be observed in a case of such great public significance so that the issues 'involved may be clearly understood.'" (Emphasis and bracketed phrases supplied.)

The same considerations are precisely applicable in the present case and call for a denial of plaintiff's motion.

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Therefore, it is respectfully submitted that plaintiff's motion for judgment is without merit and should be denied.

Respectfully submitted,

PRICE DANIEL
Attorney General of Texas
J. CHRYS DOUGHERTY
JESSE P. LUTON, JR.
K. BERT WATSON
DOW HEARD
Assistant Attorneys General

October, 1949.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, ~~1949~~

No. ~~14~~, Original

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

## ANSWER OF THE STATE OF TEXAS

PRICE DANIEL
Attorney General of Texas

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

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No. 14, Original

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UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

---

## MOTION FOR LEAVE TO FILE

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The State of Texas, by its Attorney General, asks leave of the Court to file its answer to the complaint filed herein by the United States of America.

PRICE DANIEL
Attorney General of Texas

## ANSWER

Now comes the State of Texas, by its Attorney General, and says in answer to the complaint herein:

### I

Answering paragraph I of the complaint, defendant denies that this Court has jurisdiction of this cause under Article III, Section 2, Clause 2, of the Constitution of the United States.

### II

Answering paragraph II of the complaint, defendant denies:

1. That plaintiff now is, or ever has been, the owner of the lands, minerals, or other things underlying the Gulf of Mexico within the area described in the complaint, except such specifically described tracts or parcels thereof as have been acquired by plaintiff from defendant by deeds of conveyance or condemnation;

2. That plaintiff now is, or ever has been, possessed of paramount rights in, or full dominion or power over, the lands, minerals, or other things underlying the Gulf of Mexico within the area described in the complaint, except those same paramount governmental rights and the same dominion and power which, under the Constitution of the United States, plaintiff possesses over privately owned lands and over lands beneath all other navigable waters within the United States.

III

Answering paragraph III of the complaint, defendant admits that it claims rights, title, and interests in said lands, minerals, and other things, subject to the paramount governmental rights and powers which, under the Constitution of the United States, plaintiff possesses over privately owned lands and over lands beneath all other navigable waters within the United States. Except as to those specific tracts or parcels acquired by plaintiff from defendant by deeds of conveyance or condemnation, defendant admits that its title and rights are adverse to the claim of ownership which the Attorney General seeks to assert on behalf of the United States. Defendant admits that its claims are adverse to any other rights which the Attorney General claims for the United States in excess of the governmental rights, dominion, and power which, under the Constitution of the United States, the plaintiff possesses over privately owned lands and over lands beneath all other navigable waters within the United States. Defendant denies that its claims are adverse to, or that they have been held or exercised adversely to, the aforesaid constitutional rights, dominion, or power of the United States. On the contrary, defendant says that its title and rights have been held and exercised subject to, and without any interference with, any paramount constitutional right or power possessed, exercised, or properly sought to be exercised, by the United States.

IV

Defendant admits the allegations contained in paragraph IV of the complaint.

V

Answering paragraph V of the complaint, defendant admits that it has negotiated and executed leases with various persons and corporations covering certain lands and minerals in the area described in the complaint. Defendant admits that these lessees have paid to the State substantial sums of money, entered upon said lands, and drilled wells for the recovery of such minerals, but denies that these acts, or any of them, were in violation of any rights of the United States. Defendant admits that some, but denies that all, of the wells drilled on these lands have been producing petroleum, gas, or other hydrocarbon substances, which the lessees of defendant have removed, taken, and used, paying defendant the royalties and other considerations as specified in the respective leases. Defendant denies that any of such acts of these lessees constituted a conversion of such petroleum, gas, or other hydrocarbon substances. As fully set forth in paragraph III hereof, defendant denies that the State has not recognized the constitutional rights of the United States. Defendant admits that the State has not paid to the United States either the value of, or any royalties on, any petroleum or other things taken from such lands. Defendant denies that the United States is entitled to the value of, or any royalties on, any

petroleum or other things taken from such lands, or to any other monies derived by the State from the area. Defendant denies that it has knowledge or information sufficient to form a belief as to the truth of the averments that its lessees have not recognized the rights of the United States and that these lessees, or any of them, have not paid to the United States either the value of, or any royalties on, any petroleum or other things taken from the lands described in the complaint.

VI

Defendant denies each and every allegation contained in paragraph VI of the complaint.

VII

Answering paragraph VII of the complaint, defendant admits that the State of Texas has claimed, and does now claim, full and complete ownership of the lands, minerals, and other things underlying the Gulf of Mexico within the boundaries of the State of Texas, except such specifically described tracts or parcels thereof as have been acquired by plaintiff from defendant by deeds of conveyance or condemnation, and that this claim is subject to those paramount governmental rights and the same dominion and power which, under the Constitution of the United States, plaintiff possesses over privately owned lands and over lands beneath all other navigable waters within the United States. Defendant admits that the State of Texas will continue to claim such ownership for itself and to exercise all the

rights incident thereto. Defendant denies that any of the acts of the State or of any of its lessees or of any other person acting under or pursuant to State authority constituted, or will constitute, a trespass upon the lands alleged to be in controversy, or any part thereof. Defendant denies that it or any of its lessees or anyone acting under authority of the State of Texas will be in violation of any rights of the United States in taking or using the minerals or other things from, in, or under the lands alleged to be in controversy. Defendant denies that the United States will suffer irreparable, or any, injury and that there is no adequate remedy except by this action.

VIII

Defendant denies each and every allegation in the complaint not herein admitted, controverted, or specifically denied.

**Affirmative Defense of Prescription**

Under its claim of ownership and of sovereign rights as an independent nation, the Republic of Texas, from March 2, 1836, to December 29, 1845, had open, adverse, exclusive, and uninterrupted possession and exercised jurisdiction and control over the lands, minerals, and other things underlying that part of the Gulf of Mexico within its boundaries, established at three marine leagues from shore by Act of its First Congress on December 19, 1836. This

claim and the rights so exercised were recognized and acquiesced in by the United States and other major nations of the world.

Thereafter, the terms of the annexation agreement between the United States and Texas recognized and preserved Texas' claim and its rights thereunder. The State of Texas, as successor to the Republic of Texas, not having ceded, transferred, or relinquished its claim or rights to the United States, has continued to assert and exercise them, subject to and without interference with those constitutional powers which the Federal Government possesses over these and all other lands beneath navigable waters within the United States. During this period of more than 100 years, the State of Texas, subject to and in full recognition of the aforesaid constitutional powers of the Federal Government, has continued to hold open, adverse, exclusive, and uninterrupted possession over the lands, minerals, and other things lying beneath the Gulf of Mexico within the original boundaries of the State, and has continued to exercise jurisdiction and control thereover without dispute, challenge, or objection by the United States. On the contrary, the United States, both in international agreements and in its domestic affairs, has recognized and acquiesced therein. The United States is thereby precluded from asserting or claiming any right, title, or interest adverse to the ownership and rights of the State of Texas as thus recognized and acquiesced in by the United States both while Texas was an independent nation and since it has been a member of the Union.

Therefore, in addition to its other defenses, defendant says that the State of Texas, under the doctrine of prescription, has established such ownership and sovereign rights in the area as preclude the granting of the relief prayed for by the Federal Government in this case.

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Wherefore, the defendant prays that the plaintiff take nothing by its complaint herein, that plaintiff's suit be dismissed with prejudice, and that defendant recover its costs and expenses herein incurred.

PRICE DANIEL
Attorney General of Texas

November 9, 1949.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, ~~1948~~ 1949 '51

No. ~~14~~ 13, Original

UNITED STATES OF AMERICA
*Plaintiff*

*v.*

STATE OF TEXAS
*Defendant*

## MOTION OF THE STATE OF TEXAS FOR APPOINTMENT OF A SPECIAL MASTER

PRICE DANIEL
Attorney General of Texas
J. CHRYS DOUGHERTY
JESSE P. LUPTON, JR.
K. BERT WATSON
DOW HEARD
WALTON S. ROBERTS
CLAUDE C. McMILLAN
Assistant Attorneys General

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

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No. 14, Original

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UNITED STATES OF AMERICA
*Plaintiff*

*v.*

STATE OF TEXAS
*Defendant*

---

## MOTION FOR LEAVE TO FILE

The State of Texas, by its Attorney General, asks leave of the Court to file its motion for appointment of a special master.

PRICE DANIEL
Attorney General of Texas

## MOTION FOR APPOINTMENT OF A SPECIAL MASTER

Unless the full Court can conduct the pre-trial proceedings and hear the evidence to be introduced in this case, defendant respectfully prays:

1. That the Court refer this case to a special master, to be hereafter designated and appointed, to conduct pre-trial proceedings, take the evidence, and make his report to this Court, together with such findings of fact and conclusions of law as the Court may deem proper; said master to have the same duties, power, and authority given to masters appointed under the rules prescribed by this Court for the district courts of the United States.

2. That the plaintiff and defendant, respectively, be required to make with the clerk of this Court such amount of deposits for fees, costs, and expenses of the master and clerk as may from time to time be requested by the clerk.

### Statement in Support

That the presentation of evidence is necessary before the Court can decide the basic issues of this case has been maintained by Texas since the beginning of this litigation.[1] The issues of fact and law raised by the complaint and answer make the necessity for such presentation clear.

Under the due process clause of the Constitution of the United States, defendant is entitled to a full

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[1] Objections to Motion for Leave to File Complaint, p. 6; Supplemental Statement and Brief in Support of Objections to Motion for Leave to File Complaint, pp. 27-29.

hearing before the tribunal empowered to perform the judicial function. That includes the right to introduce evidence and have judicial findings based upon it.

Defendant now seeks appropriate procedure under which it may exercise this constitutional right, because it believes the introduction of evidence is necessary in order properly to oppose the claims of the United States and to present its defenses. Defendant desires to offer a great amount of relevant testimony and documentary evidence in the form of maps, charts, diplomatic correspondence, foreign records, personal papers of many men who had a part in the annexation of Texas as well as in the subsequent interpretation of the annexation agreement by the United States, and numerous other similar types of documentary evidence.

The appointment of a special master to hear and take the evidence and report to the Court his findings of fact and conclusions of law has been the accepted procedure of this Court in the past in most of the original actions similar in nature to the present one.

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See *Baltimore & O. Ry. v. United States*, 298 U.S. 349, 369 (1936); *Oregon Ry. & Nav. Co. v. Fairchild*, 224 U.S. 510, 525 (1912).

Special masters of the type here requested were appointed by this Court in the following cases: *United States v. Wyoming*, 325 U.S. 833 (1945); *Colorado v. Kansas*, 316 U.S. 645 (1942); *Kansas v. Missouri*, 311 U.S. 614 (1940); *Missouri v. Iowa*, 304 U.S. 549 (1938); *Texas v. Florida*, 301 U.S. 671 (1937); *Arkansas v. Tennessee*, 301 U.S. 666 (1937); *Texas v. New Mexico*, 298 U.S. 644 (1936); *United States v. Oregon*, 51 S. Ct. 482 (1931); *United States v. Utah*, 283 U.S. 65, 72 (1931); *New Jersey v. Delaware*, 280 U.S. 529 (1930); *Louisiana v. Mississippi*, 278 U.S. 557

The fact that there was no master appointed in *United States v. California*, 332 U.S. 19 (1947), before a decision on the merits is immaterial here, because in that case neither party "suggested any necessity for the introduction of evidence."[1] Moreover, the facts in the two cases are entirely different. In this case the United States already has admitted that Texas entered the Union under circumstances different from those under which California entered.[2] That Texas has special defenses was responsibly and repeatedly acknowledged by the Attorney General of the United States in his testimony before congressional committees in 1948.[3] This was recently reiterated by Solicitor General Philip B. Perlman in testimony before the House Judiciary Committee, where he said:

> "As you know, Texas has special defenses that it is entitled to make that did not apply in the case of California."[4]

Because of the importance of this case, defendant would prefer that the full Court hear and pass upon

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(1928); *Massachusetts v. New York*, 271 U.S. 65, 81 (1926); *Wisconsin v. Illinois*, 271 U.S. 650 (1926); *New Mexico v. Texas*, 266 U.S. 586 (1924); *Oklahoma v. Texas*, 256 U.S. 692 (1921); *Georgia v. South Carolina*, 253 U.S. 477 (1920). (The citation of the order of appointment has been given where available.)

[1] 332 U.S. at 24.

[2] Motion for Leave to File Complaint, p. 3.

[3] Joint Hearings Before the Committees on the Judiciary, 80th Cong., 2d Sess., on S. 1988 and Similar House Bills, February-March, 1948, 616, 617, 635, 689, 690.

[4] Hearings Before Subcommittee No. 1, House Judiciary Committee, 81st Cong., 1st Sess., on H. R. 5991 and H. R. 5992, Aug. 29, 1949, Reporter's Transcript, v. III, p. 373.

the evidence, but if that procedure is not adopted, the appointment of a special master is the proper alternative. While less desirable, the latter procedure would be efficient and expeditious and, at the same time, would protect the rights of the defendant to a full and orderly presentation of its defenses. There can be no argument that a hearing of the case on exceptions to the master's report also would limit and clarify the ultimate issues that this Court must pass upon and would make the task of the Court less difficult and less time-consuming.

It is respectfully submitted that unless the full Court will conduct the pre-trial proceedings and hear the evidence, the motion for appointment of a special master should be granted.

Respectfully submitted,

PRICE DANIEL
Attorney General of Texas
J. CHRYS DOUGHERTY
JESSE P. LUPTON, JR.
K. BERT WATSON
DOW HEARD
WALTON S. ROBERTS
CLAUDE C. MCMILLAN
Assistant Attorneys General

November, 1949.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950 1954

No. ~~M~~ 8, Original

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

## MOTION FOR ORDER TO TAKE ORAL DEPOSITIONS

PRICE DANIEL
Attorney General of Texas
J. CHRYS DOUGHERTY
JESSE P. LUTON, JR.
K. BERT WATSON
DOW HEARD
WALTON S. ROBERTS
CLAUDE C. MCMILLAN
Assistant Attorneys General

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

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No. 13, Original

---

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

---

## MOTION FOR LEAVE TO FILE

The State of Texas, by its Attorney General, asks leave of the Court to file its motion for order to take oral depositions.

PRICE DANIEL
Attorney General of Texas

MOTION FOR ORDER TO TAKE ORAL DEPOSITIONS

Now comes the State of Texas, defendant in the above-entitled cause and moves for an order granting leave to take the oral deposition of Captain Thomas Fenlon of Hunt, Texas, at his residence near Hunt, Texas, on the day of December 2, 1949, at 2 o'clock in the afternoon, and the oral depositions of Robert H. Armiger, 945 Alma Street; Captain Richard Carey, 1165 Roberts Avenue; Richard Carey, Jr., 2396 Victoria Street; and Edgar Granger, 940 Roberts Avenue; all of Beaumont, Texas, at the law offices of Benckenstein, Wells and Duncan, 610 San Jacinto Building, Beaumont, Texas, on the day of December 5, 1949, at 10 o'clock in the forenoon, and from day to day until completed.

**Statement**

In a federal district court, at this stage of the proceedings, Rule 26(a) of the Federal Rules of Civil Procedure would permit defendant to take these depositions "without leave of court." However, since the Federal Rules of Civil Procedure are applicable here by analogy only, defendant asks leave of the Court to take the depositions.

Witness Fenlon is now 81 years of age; witnesses Robert H. Armiger, Captain Richard Carey, Richard Carey, Jr., and Edgar Granger are now 80, 90, 60, and 62 years of age respectively. The age and physical condition of some of these witnesses make it necessary that their depositions be taken im-

mediately in order that their testimony may be preserved.

Notice of this motion is given to the plaintiff by service of copies upon the Attorney General of the United States and upon the Solicitor General of the United States.

Respectfully submitted,

PRICE DANIEL
Attorney General of Texas
J. CHRYS DOUGHERTY
JESSE P. LUTON, JR.
K. BERT WATSON
DOW HEARD
WALTON S. ROBERTS
CLAUDE C. MCMILLAN
Assistant Attorneys General

November, 1949.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, ~~1949~~ ~~1950~~ 1951

No. 18, Original

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

## AMENDED MOTION FOR ORDER TO TAKE ORAL DEPOSITIONS, STATEMENT IN SUPPORT, AND REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE ORIGINAL MOTION

PRICE DANIEL
Attorney General of Texas
J. CHRYS DOUGHERTY
JESSE P. LUTON, JR.
K. BERT WATSON
DOW HEARD
WALTON S. ROBERTS
CLAUDE C. MCMILLAN
Assistant Attorneys General.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

---

No. 13, Original

---

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

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## AMENDED MOTION FOR ORDER TO TAKE ORAL DEPOSITIONS

Now comes the State of Texas, defendant in the above-entitled cause, and moves for an order granting leave to take the oral depositions of Captain Thomas Fenlon of Hunt, Texas, at his residence near Hunt, Texas; and of Robert H. Armiger, 945 Alma Street; Captain Richard Carey, 1165 Roberts Avenue; Richard Carey, Jr., 2396 Victoria Street; and Edgar Granger, 940 Roberts Avenue; all of Beaumont, Texas, at the law offices of Benckenstein, Wells and Duncan, 610 San Jacinto Building, Beaumont, Texas, on early dates to be set by defendant after reasonable notice to the plaintiff as provided in Rule 30(a) of the Federal Rules of Civil Procedure.

**Statement in Support**

On November 18, 1949, the State of Texas filed its motion for an order granting leave to take the oral depositions of Captain Thomas Fenlon on December 2, 1949, and of Robert H. Armiger and others on December 5, 1949. Since the Court took no action thereon prior to its present recess (November 21-December 5), and it being apparent that because of this recess an order could not be entered in time to permit the taking of these depositions on the requested dates, defendant respectfully submits its amended motion for leave to take such depositions at later dates upon appropriate notice to the plaintiff.

As stated in the original motion, if this suit were pending in a federal district court, the defendant, at this stage of the proceedings, would be privileged, under Rule 26(a) of the Federal Rules of Civil Procedure, to take these depositions "without leave of court." However, since the Federal Rules of Civil Procedure are applicable here by analogy only, defendant asks leave of the Court to take the depositions under the procedure therein set forth.

As further stated in the original motion, witnesses Fenlon, Armiger, Richard Carey, Richard Carey, Jr., and Granger are now 81, 80, 90, 60 and 62 years of age respectively. The age and physical condition of some of these witnesses indicate the importance, if not the necessity, of taking their depositions without delay in order that their testimony may be preserved. In view of the present possibility that these witnesses may not later be available, defendant

desires that the depositions be taken at the earliest practicable date consistent with the health, physical condition, and availability of the witnesses to appear and to testify by deposition. Proceeding in accordance with Rule 30(a) of the Federal Rules of Civil Procedure will provide the necessary flexibility as to the exact date on which a given deposition shall be taken, which appears at this time to be required by the state of health of some of these witnesses, and also will provide due notice thereof to plaintiff.

Respectfully submitted,

PRICE DANIEL
Attorney General of Texas
J. CHRYS DOUGHERTY
JESSE P. LUTON, JR.
K. BERT WATSON
DOW HEARD
WALTON S. ROBERTS
CLAUDE C. MCMILLAN
Assistant Attorneys General

December 2, 1949.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

No. 13, Original

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

## REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE ORIGINAL MOTION FOR LEAVE TO TAKE ORAL DEPOSITIONS

On November 30, 1949, the plaintiff filed objections to the granting of defendant's motion for leave to take oral depositions. Plaintiff simultaneously filed a motion for judgment on the pleadings seeking to have the case disposed of without the taking of evidence, but reserving its "right to trial on any issues of fact which cannot be resolved by judicial notice."[1] In opposing defendant's motion to take the depositions, plaintiff relies solely upon the assumption that inevitably plaintiff's motion for judgment on the pleadings will be granted and that no

[1] Motion for Judgment, p. 1.

evidence will be heard unless plaintiff desires to offer it.

Defendant will reply to plaintiff's motion for judgment in due course. The present reply is addressed only to plaintiff's memorandum in opposition to the request for leave to take oral depositions.

Defendant respectfully submits that the denial of its motion for leave to take these oral depositions and the plaintiff's proposed limitation of the facts to those which may be judicially noticed will deprive defendant of this relevant and material proof which it is entitled to present to the Court, for the following reasons:

1. Unless the defendant is permitted to take these depositions, it has no other way properly to develop the facts within the knowledge of these witnesses, and thus will be deprived of the benefit of relevant and material proof in support of certain of its defenses. The testimony of these witnesses is desired on two issues:

(a) The existence and the extent of knowledge and use of subsoil minerals, especially oil, within the area described in the complaint prior to and since the annexation agreement between the United States and Texas. This is relevant to the intent of the parties to the agreement and supports defendant's contention that such subsoil minerals were specifically intended to be reserved to the State of Texas under the terms of the annexation agreement and were not intended thereby to be conveyed to the United States.

(b) The various uses to which the State of Texas has devoted portions of the lands, minerals, and other

things within the area described in the complaint and the open, adverse, exclusive, and uninterrupted character of the defendant's possession of these lands, minerals, and other things. This is relevant to the prescriptive rights of defendant based in part upon open, adverse, exclusive, and uninterrupted possession over lands, minerals, and other things described in the complaint, without interference with any of the constitutional powers of the Federal Government.

2. The time consumed in the disposal of other motions now before the Court may deprive defendant of this evidence altogether. During the pendency of plaintiff's motion for judgment and of defendant's motion for appointment of a special master, and before the issues on the merits can be reached under any due and orderly process, it is obvious that because of the precarious state of health of some of these witnesses, they may become unavailable. In that event, the failure to utilize the present interim for the taking of these depositions will have deprived the defendant of the benefit of relevant and material proof in support of its defenses. On the other hand, it is respectfully submitted that plaintiff's motion for judgment will be neither prejudiced nor delayed by the preservation of this testimony.

Defendant believes its request is reasonable and that the taking of these depositions is necessary. Despite plaintiff's continued implications to the contrary, defendant is not interested in any unreasonable delay of this case. Defendant recognizes the plaintiff's desire that the case be disposed of as speedily as possible. It was partially in the interest of such timely disposition that defendant's motion

was filed promptly after its answer. A more compelling reason, however, was the necessity that the depositions be taken immediately because of the age and physical condition of some of the witnesses.

Therefore, defendant respectfully requests that its amended motion for leave to take these oral depositions be granted.

Respectfully submitted,

PRICE DANIEL
Attorney General of Texas
J. CHRYS DOUGHERTY
JESSE P. LUTON, JR.
K. BERT WATSON
DOW HEARD
WALTON S. ROBERTS
CLAUDE C. MCMILLAN
Assistant Attorneys General

December 2, 1949.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, ~~1949~~

No. 13, Original

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

## FIRST AMENDED ANSWER OF THE STATE OF TEXAS

PRICE DANIEL
Attorney General of Texas

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

No. 13, Original

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

## MOTION FOR LEAVE TO FILE

The State of Texas, by its Attorney General, asks leave of the Court to file its first amended answer to the complaint filed herein by the United States of America.

### Statement With Reference to Motion

The amended answer which the State of Texas now requests leave to file presents with additional clarity the grounds relied upon by the State of Texas in defense to the claim of the United States. It is necessary to a full and complete presentation of the issues that this amended answer be filed prior to considera-

tion of plaintiff's motion for judgment on the pleadings. The request has been made promptly in order to occasion no delay in the proceedings.

This Court at a very early date gave effect to the practice of permitting the amendment of pleadings in original proceedings. In *Rhode Island v. Massachusetts*, 12 Pet. 657, 759 (1838), the Court permitted the parties to amend their pleadings six years after the original bill was filed. The view of this Court on permitting amendments in original actions was expressed in that case as follows:

> "In ordinary cases between individuals, the court of chancery has always exercised an equitable discretion in relation to its rules of pleadings, whenever it has been found necessary to do so for the purposes of justice. And in a case like the present, the most liberal principles of practice and pleading ought unquestionably to be adopted, in order to enable both parties to present their respective claims in their full strength." (14 Pet. 210, 257.)

In accord with this policy, leave to amend has since been granted by the Court in a number of orginal actions.

This liberal policy toward amendments appears also in the Federal Rules of Civil Procedure, which are applicable by analogy in original proceedings in this Court. Rule 15(a) provides in part:

> "Otherwise a party may amend his pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

The federal courts have consistently shown "a strong liberality . . . in allowing amendments under 15(a)." *Tahir Erk v. Glenn L. Martin Co.*, 116 F. 2d 865 (C.C.A. 4th, 1941). This is particularly true where the opposing party will not be unduly prejudiced or the trial of the issues unduly delayed.

It is apparent from the nature of the changes made by the amended answer that the amendment will not result in any changes in the plan of presentation and argument of the plaintiff to its prejudice. Nor will the hearing of the issues be delayed by the granting of leave to amend.

## FIRST AMENDED ANSWER

Now comes the State of Texas, by its Attorney General, and says in its amended answer to the complaint herein:

### I

Answering paragraph I of the complaint, defendant denies that this Court has jurisdiction of this cause under Article III, Section 2, Clause 2, of the Constitution of the United States, because the complaint presents no case or controversy within the meaning of this article.

### II

Answering paragraph II of the complaint, defendant denies:

1. That plaintiff now is, or ever has been, the owner of the lands, minerals, or other things underlying the Gulf of Mexico within the area described in the complaint, except such specifically described tracts or parcels thereof as have been acquired by plaintiff from defendant by deeds of conveyance or condemnation. Except as to such tracts or parcels of land, defendant specifically denies that plaintiff now has, or ever has had, any character of proprietary right or title in any of the lands, minerals, or other things in the area described in the complaint.

2. That plaintiff now is, or ever has been, possessed of paramount rights in, or full dominion or power over, the lands, minerals, or other things

underlying the Gulf of Mexico within the area described in the complaint, except the paramount power to control, improve, and regulate navigation which, under the commerce clause of the Constitution of the United States, plaintiff has over lands beneath all navigable waters within the United States, whether inland or coastal, and except the same dominion and paramount power which, under the Constitution of the United States, plaintiff has over uplands within the United States, whether privately or State owned. Defendant denies that these or any other paramount powers, rights, or dominion of the United States include ownership of the right to take, develop, or authorize the taking or developing of petroleum, gas, or other minerals lying beneath the land described in the complaint without compensation to the State of Texas. Defendant denies that these or any other paramount powers, rights, or dominion of the United States include the right to control or to prevent the taking or developing of such minerals by defendant or its lessees except when necessary in the exercise of the paramount Federal powers as above recognized by defendant and when duly authorized by appropriate congressional action.

III

Answering paragraph III of the complaint, defendant admits that it claims rights, title, and interests in said lands, minerals, and other things, and says that its rights include ownership and the right to take, use, lease, and develop the minerals

and other resources therein, subject to the dominion and paramount powers of the United States as recognized in section 2, paragraph II above. Except as to those specific tracts or parcels acquired by plaintiff from defendant by deeds of conveyance or condemnation, defendant admits that its title and rights are adverse to the claim of ownership which the Attorney General seeks to assert on behalf of the United States. Defendant admits that its claims are adverse to any other rights which the Attorney General claims for the United States in excess of the dominion and paramount powers of the United States as recognized in section 2, paragraph II above. Defendant denies that its claims are adverse to, or that they have been held or exercised adversely to, the aforesaid constitutional rights, dominion, or power of the United States. On the contrary, defendant says that its title and rights have been held and exercised subject to, and without any interference with, any paramount constitutional power possessed, exercised, or properly sought to be exercised, by the United States. Defendant further says that the United States has not sought, and does not seek now, to acquire said lands, minerals, or other things or any rights therein in accordance with the requirements of the Fifth Amendment to the Constitution of the United States. Neither has it sought, nor does it seek now, to prevent the taking or development of the minerals by defendant and its lessees because of any interference with the exercise, or attempted exercise of, any of the paramount Federal powers recognized in section 2, paragraph II above.

IV

Defendant admits the allegations contained in paragraph IV of the complaint.

V

Answering paragraph V of the complaint, defendant admits that it has negotiated and executed leases with various persons and corporations covering certain lands and minerals in the area described in the complaint. Defendant admits that these lessees have paid to the State substantial sums of money, entered upon said lands, and drilled wells for the recovery of such minerals, but denies that these acts, or any of them, were in violation of any rights of the United States. Defendant admits that some, but denies that all, of the wells drilled on these lands have been producing petroleum, gas, or other hydrocarbon substances, which the lessees of defendant have removed, taken, and used, paying defendant the royalties and other considerations as specified in the respective leases. Defendant denies that any of such acts of these lessees constituted a conversion of such petroleum, gas, or other hydrocarbon substances. As fully set forth in paragraph III hereof, defendant denies that the State has not recognized the constitutional rights of the United States. Defendant admits that the State has not paid to the United States either the value of, or any royalties on, any petroleum or other things taken from such lands. Defendant denies that the United States is entitled to the value of, or any royalties on, any petroleum or

other things taken from such lands, or to any other monies derived by the State from the area. Defendant denies that it has knowledge or information sufficient to form a belief as to the truth of the averments that its lessees have not recognized the rights of the United States and that these lessees, or any of them, have not paid to the United States either the value of, or any royalties on, any petroleum or other things taken from the lands described in the complaint.

VI

Defendant denies each and every allegation contained in paragraph VI of the complaint.

VII

Answering paragraph VII of the complaint, defendant admits that the State of Texas has claimed, and does now claim, title and full and complete ownership of the lands, minerals, and other things underlying the Gulf of Mexico within the boundaries of the State of Texas, except such specifically described tracts or parcels thereof as have been acquired by plaintiff from defendant by deeds of conveyance or condemnation, and that this claim is subject to the dominion and paramount powers of the United States as recognized in section 2, paragraph II above. Defendant admits that the State of Texas will continue to claim such title and ownership for itself and to exercise all the rights incident thereto. Defendant denies that any of the acts of the State or of any

of its lessees or of any other person acting under or pursuant to State authority constituted, or will constitute, a trespass upon the lands alleged to be in controversy, or any part thereof. Defendant denies that it or any of its lessees or anyone acting under authority of the State of Texas will be in violation of any rights of the United States in taking or using the minerals or other things from, in, or under the lands alleged to be in controversy. Defendant denies that the United States will suffer irreparable, or any, injury and that there is no adequate remedy except by this action.

VIII

Defendant denies each and every allegation in the complaint not herein admitted, controverted, or specifically denied.

**First Affirmative Defense**

Under its claim of title, of ownership, and of sovereign rights as an independent nation, the Republic of Texas, from March 2, 1836, to December 29, 1845, had open, adverse, exclusive, and uninterrupted possession and exercised jurisdiction and control over the lands, minerals, and other things underlying that part of the Gulf of Mexico within its boundaries, established at three marine leagues from shore by Act of its First Congress on December 19, 1836. This claim and the rights so exercised were recognized and acquiesced in by the United States and other major nations of the world.

Thereafter, the terms of the annexation agreement between the United States and Texas recognized and preserved Texas' claim and its rights thereunder. The State of Texas, as successor to the Republic of Texas, not having ceded, transferred, or relinquished its claim, its title, or its rights to the United States, has continued to assert and exercise them, subject to and without interference with the dominion and paramount powers of the United States as recognized in section 2, paragraph II above. During this period of more than 100 years, the State of Texas, subject to and in full recognition of the aforesaid constitutional powers of the Federal Government, has continued to hold open, adverse, exclusive, and uninterrupted possession, jurisdiction, and control of the lands, minerals, and other things lying beneath the Gulf of Mexico within the original boundaries of the State under its claim of title, ownership, and governmental rights, without dispute, challenge, or objection by the United States or any other nation. On the contrary, the United States, both in international agreements and in its domestic affairs, has recognized, and acquiesced in, this claim and these rights. The United States is thereby precluded from asserting or claiming any right, title, or interest adverse to the ownership and rights of the State of Texas as thus recognized and acquiesced in by the United States and other nations both while Texas was an independent nation and since it has been a member of the Union.

Therefore, in addition to its other defenses, defendant says that the State of Texas, under the doctrine of prescription, has established such title, own-

ership, and sovereign rights in the area as preclude the granting of the relief prayed for by the Federal Government in this case.

## Second Affirmative Defense

On March 2, 1836, Texas declared its independence from Mexico, and, by the decisive battle of San Jacinto on April 21, 1836, effectively established this independence and thus became a sovereign nation. On December 19, 1836, the first Congress of the Republic of Texas passed an act providing:

> "Be it enacted by the senate and house of representatives of the republic of Texas, in congress assembled, That from and after the passage of this act, the civil and political jurisdiction of this republic be, and is hereby declared to extend to the following boundaries, to wit: beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande, thence up the principal stream of said river to its source, thence due north to the forty-second degree of north latitude, thence along the boundary line as defined in the treaty between the United States and Spain, to the beginning . . . . ."

Thereafter, the United States, France, Great Britain, and The Netherlands, with knowledge of these declared boundaries, formally recognized the Republic of Texas as a sovereign nation.

By Joint Resolution of the Senate and House of Representatives of the United States of America, in

Congress assembled, the Congress resolved on March 1, 1845:

> "That Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new state, to be called the state of Texas, . . . in order that the same may be admitted as one of the States of this Union."

And further resolved:

> "That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to-wit: *First*—said state to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments. . . . *Second*—said state, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind which may belong to or be due and owing said republic; and shall also retain all the vacant and unappropriated lands lying within its limits. . . . "

On June 23, 1845, the Senate and House of Representatives of the Republic of Texas, in Congress assembled, passed a joint resolution which, after reciting in its preamble the specific terms of the offer of statehood contained in the Joint Resolution of the Congress of the United States, resolved:

"That, the Government of Texas doth consent, that the People and Territory of the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a Republican form of Government, to be adopted by the people of said Republic, by Deputies in Convention assembled, in order that the same may be admitted as one of the States of the American Union, and said consent is given on the terms, guarantees and conditions set forth in the Preamble to this Joint Resolution."

By an ordinance adopted July 4, 1845, the Convention of Texas, called for the purpose of adopting a Constitution for the State of Texas, assented to and accepted "the proposals, conditions and guarantees contained in the first and second sections of the Resolution of the Congress of the United States aforesaid."

This Constitution of the State of Texas, adopted in 1845 "in accordance with the provisions of the Joint Resolution for annexing Texas to the United States" and accepted by the Congress of the United States, contained the following provisions:

"The rights of property and of action which have been acquired under the Constitution and laws of the Republic of Texas, shall not be divested; . . . but the same shall remain precisely in the situation which they were before the adoption of this Constitution." (Article VII, Section 20.)

"All laws and parts of laws now in force in the Republic of Texas, which are not repugnant to the Constitution of the United States, the

Joint resolutions for annexing Texas to the United States, or to the provisions of this Constitution, shall continue and remain in force as the laws of this State, until they expire by their own limitation, or shall be altered or repealed by the Legislature thereof." (Article XIII, Section 2.)

Thereafter, the Congress of the United States on December 9, 1845, passed a joint resolution as follows:

"Whereas, the Congress of the United States, by a Joint Resolution approved March the first, eighteen hundred and forty-five, did consent that the territory properly included within, and rightfully belonging to the Republic of Texas, might be erected into a new state, to be called *The State of Texas*, . . . in order that the same might be admitted as one of the states of the Union; which consent of Congress was given upon certain conditions specified in the first and second sections of said Joint Resolution: And whereas, the people of the said Republic of Texas, by deputies in Convention assembled, with the consent of the existing government, did adopt a Constitution and erect a new state, with a republican form of government, and in the name of the people of Texas, and by their authority, did ordain and declare, that they assented to and accepted the proposals, conditions, and guarantees contained in said first and second sections of said resolution: And whereas the said Constitution, with the proper evidence of its adoption by the people of the Republic of Texas, has been transmitted to the President of the United States, and laid before

Congress, in conformity to the provisions of said Joint Resolution:

"Therefore

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of Texas shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever."

By these acts on the part of the United States and the Republic of Texas, when construed, as they must be, in the light of the intention of the contracting parties, there was a binding agreement between the two independent sovereigns that upon annexation Texas would not cede to the United States any, but that the newly created State would retain all, of the lands, minerals, and other things lying beneath that part of the Gulf of Mexico within the original boundaries of the Republic, as well as the right to take, use, and develop the lands and minerals, subject only to the dominion and paramount powers of the United States as recognized in section 2, paragraph II above.

Therefore, in addition to its other defenses, defendant says that the Republic of Texas having fully complied with the terms and conditions of the annexation agreement by which it entered and was admitted into the Union, the United States, having received and accepted the full benefits of this compliance, is now estopped to claim or to exercise any title or rights inconsistent with or in derogation of the terms, conditions, and guarantees of this binding agreement between two equal sovereign nations.

## Third Affirmative Defense

The boundaries of the State of Texas as declared, established, and maintained by the Republic of Texas were confirmed by the United States in the Treaty of Guadalupe Hidalgo, proclaimed by the United States and Mexico on July 4, 1848, Article V of which provides:

> "The Boundary line between the two Republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte . . . . ."

Later by the Gadsden Treaty, proclaimed by the United States and Mexico on June 30, 1854, these boundaries of the State of Texas were further confirmed by the United States. Article I of this treaty provides:

> ". . . the limits between the Two Republics shall be as follows: Beginning in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande as provided in the fifth article of the treaty of Guadalupe Hidalgo. . . ."

A convention concluded between the United States and Mexico, proclaimed September 14, 1886, contained the following stipulation in Article I:

> "The dividing line [between the United States and Mexico] shall forever be that described in the aforesaid Treaty [of Guadalupe Hidalgo] . . . . ."

This stipulation was reaffirmed in a convention concluded between these same nations, proclaimed June 5, 1907:

Therefore, in addition to its other defenses, defendant says that by these acts and treaties and these conventions, the United States acknowledged and confirmed the three-league boundary of the State of Texas in the Gulf of Mexico as declared, established, and maintained by the Republic of Texas and as retained by the State of Texas under the annexation agreement. By the same token, the United States acknowledged and confirmed to the State of Texas the rights to the lands, minerals, and other things within this boundary which were retained by the State upon annexation to the United States. The United States is, therefore, estopped from now claiming title to any lands, minerals, or other things within the boundaries of Texas as thus acknowledged and confirmed, except those specifically described tracts or parcels thereof that have been acquired by plaintiff from defendant by condemnation or deeds of conveyance, and is further estopped from asserting or exercising any "paramount rights in or dominion and power over," any lands, minerals, or other things within these boundaries, except the dominion and paramount rights of the United States as recognized in section 2, paragraph II above.

---

Wherefore, the defendant prays that the plaintiff take nothing by its complaint herein, that plaintiff's suit be dismissed with prejudice, and that defendant recover its costs and expenses herein incurred.

PRICE DANIEL
Attorney General of Texas

December 16, 1949.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, ~~1949~~ ~~1950~~ 1951

No. ~~18~~ 8, Original

UNITED STATES OF AMERICA
*Plaintiff*

*v.*

STATE OF TEXAS
*Defendant*

## MOTION TO PASS THE HEARING SET FOR MARCH 27

PRICE DANIEL
*Attorney General of Texas*

J. CHRYS DOUGHERTY
K. BERT WATSON
*Assistants Attorney General*

ROSCOE POUND
JOSEPH WALTER BINGHAM
MANLEY O. HUDSON
JAMES WM. MOORE
*Of Counsel.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

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No. 13, Original

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UNITED STATES OF AMERICA

*Plaintiff*

*v.*

STATE OF TEXAS

*Defendant*

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## MOTION TO PASS THE HEARING SET FOR MARCH 27

Comes now the State of Texas, by its Attorney General, and respectfully prays that the Court remove plaintiff's motion for judgment on the pleadings from the docket for Monday, March 27, 1950, and pass the hearing until Monday, May 1, or as soon thereafter as counsel may be heard.

## Statement in Support

This motion is not made for delay. It is made in complete good faith and with the sincere conviction that it is necessary in order that defendant may have a fair opportunity properly to oppose the motion for judgment on the pleadings.

It is made because the time allowed after receipt of plaintiff's brief within which defendant must prepare, print, and file its reply thereto *(27 days as compared with 77 days for plaintiff)* is wholly insufficient.

Plaintiff filed its 102-page brief in this case (as compared with 27 pages in its brief in the Louisiana case, No. 14 Original) on February 20, 1950. This was 77 days after its motion for judgment on the pleadings was set down for hearing (Dec. 5, 1949)

The hearing was originally set for February 6, 1950, but was reset *sua sponte* for March 13. Instead of filing its brief within the time allowed by the original setting (on or before January 16), plaintiff either used or waited the additional time of 35 days before filing its brief on the last day permitted for the then pending March 13 setting.[1] We do not suggest that plaintiff was not within its rights in so doing. But the fact is that *plaintiff has had an additional 35 days, or a total of 77 days*, since the motion was originally set for hearing within which to file its brief.

On the other hand, *defendant will have had only 27 days* within which to write, print, and file its reply thereto.

---

[1] The resetting *sua sponte* for March 27 was made after plaintiff's brief was filed.

We assume that plaintiff's brief, after its preparation, was not withheld from filing and, in that event, plaintiff needed 77 days to accomplish it. Obviously, the major portion of the time, was needed to deal with the special defenses of the State of Texas, not considered or ruled on at all in the *California* decision. Because of the nature of plaintiff's brief, much of which could not be anticipated, this motion to pass is made because

*(1) the time presently allowed defendant is wholly insufficient, and*

*(2) unless granted, grave injustice will be done.*

Preliminary, however, to the development of these points an analysis of the nature of the pending hearing, in the light of its background, is in order.

**Nature of the Pending Hearing Set for March 27**

The hearing set for March 27 is not on the merits of the case. It is only a hearing on plaintiff's motion for judgment on the pleadings.

Considering the nature of the pending hearing, the wholesale departure therefrom in plaintiff's brief, and the time heretofore consumed by plaintiff in this case, the motion to pass is entirely reasonable and necessary.

As is apparent from plaintiff's brief, no federal claim was made against Texas to the lands involved herein until this suit was filed 103 years after Texas entered the Union. This Court's decision in *United States v. California*, 332 U.S. 19, which plaintiff calls a "prima facie postulate" for the present case, was rendered on June 23, 1947. Plaintiff waited 18

months thereafter before presenting a motion for leave to file the complaint herein. Within the time allowed by the Court, the State of Texas filed its answer November 9, 1949, in which it in good faith raised certain fact issues in support of its defenses to plaintiff's claim. Simultaneously therewith the State of Texas requested appointment of a special master to hear the evidence if the Court could not do so *en banc*. The State also requested permission to take the oral depositions of several aged witnesses.

*Since then the State of Texas has been, and is now, ready to proceed to develop the evidence on the merits and thereby expedite the final and proper disposition of this case.*

On the other hand, plaintiff opposed the appointment of a special master and the granting of permission to take oral depositions. It proceeded to renew a previously unsuccessful motion for disposition of the case on the harsh and technical proceeding of motion for judgment on the pleadings. This, despite the fact that it knew, or should have known, what is now obvious from its brief, that every conclusion of law asserted against Texas' rights, title, and special defenses, is conditioned upon or intermingled with fact issues. The hearing of such a motion in advance of a trial on the merits is seldom allowed when it would delay the trial or when it would itself involve the merits of the case.* However, plaintiff has insisted on its preliminary hearing on the motion in spite of the apparent fact issues and in spite of the fact that never in its history has this Court proceeded in such summary fashion

*Federal Rules of Civil Procedure, 12(c).

against a State or individual who sought ample opportunity for full and coherent development of the issues of fact and of law.[3]

The foregoing background and statement of what has transpired thus far in this case is not for the purpose of discussing the merits of the plaintiff's motion for judgment on the pleadings. It has been mentioned only for the purpose of showing the nature of the proceeding, its effect upon the time required for final disposition of the case, and the resulting effect which the departure of plaintiff's brief from the scope of the proceeding has had upon the time required for the defendant's reply.

**The Time Presently Allowed Defendant Is Wholly Insufficient**

Considering the time permitted to plaintiff, whose counsel alone knew the theory of their case against Texas' special defenses to which its brief is devoted,

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[3] We have found only four original proceedings involving States which went to judgment without a trial for the purpose of taking evidence. *United States v. North Carolina*, 136 U.S. 211 (1890); *Iowa v. Illinois*, 202 U.S. 59 (1906); *United States v. Minnesota*, 270 U.S. 181 (1926) and *United States v. California*, 332 U.S. 19 (1947). In the foregoing cases a trial for that purpose was unnecessary because of stipulations or agreements as to facts and there was no objection or intimation by the defendant State that it desired a hearing for the purpose of taking evidence. For instance: *United States v. California* was disposed of on the pleadings because neither party "suggested any necessity for the introduction of evidence." (*United States v. California*, 332 U.S. 19, 24). In its own words, California included within its brief "a presentation of its entire case, both upon the law and the facts" (Foreword, defendant's brief, *United States v. California*), a feat which, because of the extent and nature of its evidence, the State of Texas has insisted from the beginning that it cannot accomplish.

defendant will not be allowed comparable or sufficient time within which to reply unless the hearing is passed for at least 30 days.

Again, alone knowing and planning the theory of its case against Texas' defenses, plaintiff has been able to work directly on points to be presented in its brief. Defendant has not been wanting in diligence. It has had a staff of six lawyers working full time for the past year in preparation for this case. In the light of plaintiff's brief, all of the material must be, and is being now, revised. The selection and elimination of the material will unavoidably consume considerable time. The new research suggested by plaintiff's brief must be completed; all matters on which defendant must rely to combat what it regards as plaintiff's unwarranted departure from the proper scope of the pending motion, as well as a complete argument in opposition to the motion, must be assembled and printed—*all within 77 days.* The time is wholly inadequate. It would impose a physically impossible task.

This physical impossibility, as well as the injustice of its requirement, is no doubt apparent to the Court and we had hoped that it also would be recognized by counsel for plaintiff. This detailed statement of the present motion is necessary because, although requested, the Solicitor General of the United States refused to agree to a resetting and promptly lodged his objections thereto with the Clerk for presentation to the Court. Whether he realizes it or not, the Solicitor General is seeking to force an undue advantage over defendant.

Whether 77 days were required to prepare his brief, or whether it had been previously prepared

and withheld from filing until that time, defendant is justly entitled to more than 27 days to assemble, write, and print a reply which necessarily will be longer than plaintiff's brief. This is true because plaintiff devoted less than 4 pages in its brief to its own claim of title and directed the balance thereof to attempted anticipation of, and argument against, the title and special defenses of the State of Texas, none of which was involved in the *California* case or is involved in the pending case against Louisiana.

Plaintiff devotes only two and one-half pages of its brief to the law of the *California* case and then admits that it is not applicable if, in the case of Texas, "special reasons for different treatment" exist. Plaintiff's brief then proceeds to recognize that "special defenses" do exist in the case of Texas, and the remainder of the brief is devoted to them. Solicitor General Perlman has pointed out the existence of these special defenses and the difference between this case and the *California* case[1] as follows:

> "As you know, Texas has special defenses that it is entitled to make that did not apply in the case of California."[2]

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[1] Hearings Before Subcommittee No. 1, House Judiciary Committee, 81st Cong., 1st Sess., on H.R. 5991 and H.R. 5992, Aug. 29, 1949, Reporter's Transcript, v. III, p. 373.

[2] The relevancy of Texas' previous status as an independent nation has been recognized by other executive officials as follows: President Harry S. Truman, "Texas is in a class by itself; it entered the Union by treaty." (Speech at Austin, Texas, September 27, 1948.) Harold L. Ickes: "Parenthetically, Texas may have a legal right to its tidelands because it came into the Union voluntarily and as an independent country." (Address by Harold L. Ickes over ABC Network, October 14, 1948.)

Therefore, even to complete its brief in opposition to the motion for judgment within 30 additional days will require the entire time of the available staff of the Attorney General of Texas. Defendant's regular staff assigned to this case has been at work on a 16-hour schedule since receiving plaintiff's brief. An equal number of additional assistants were promptly assigned to the case with instructions to all to do everything possible to meet the deadline for the printer. It is now ever more apparent, as heretofore expected, that this deadline cannot be met and that the rights of this State to a full and fair hearing on the motion for judgment on the pleadings will be prejudiced if this motion to pass is not granted.

**Unless the Motion to Pass Is Granted, Grave Injustice Will Be Done**

Having claimed and possessed the lands and minerals in controversy for over 100 years, the State of Texas has many more State and Federal decisions, treaties, contracts, agreements, maps, and other materials than the plaintiff was able to present in support of its motion. These will demonstrate the need for full development of the evidence as opposed to final disposition on the pleadings alone. It would be ironical if a court procedure were followed in this case which would cause the overwhelmingly larger volume of law and evidence in favor of defendant to result in a handicap to it because of the physical impossibility of properly calling attention to it in a brief within the time allowed.

Such a procedure would be quite contrary to the consideration previously allowed States of the Union in litigation before this Court, and quite contrary,

we feel, to the Court's sense of fairness and justice to any litigant, much less to a State, involved in a controversy of this magnitude.

From the earliest times this Court has recognized the grave public importance inherent in original actions involving a State and has proceeded with the utmost care and deliberation. In *Rhode Island v. Massachusetts* the Court said:

> "From the character of the parties, and the nature of the controversy, we cannot, without committing great injustice, apply to this case the rules as to time, which govern courts of equity in suits between individuals."

and in *Iowa v. Illinois* the Court said:

> "In the exercise of original jurisdiction in the determination of the boundary line between sovereign states, this Court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which full opportunity to be heard has not been afforded."

The issues raised in the present case are equally serious and the problem presented is even more complex than in any of the cases in which this or similar language has been used.

We respectfully remind the Court that in original proceedings, this Court acts as a trial court of last resort rather than as an appellate Court.

This Court's Rule 27 governing the time for filing briefs is directly applicable only to cases on the

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[1] 13 Pet. 23, 24 (1839).
[2] 151 U.S. 238, 242 (1893).

Court's appellate docket. Under Rule 5, which deals with original actions, Rule 27 governs "as far as may be." As this Court knows, the customary practice of trial courts is to allow both sides an equal time within which to file their briefs directed to preliminary motions such as the one for judgment on the pleadings.

This Court's rules applicable to appellate cases are written to cover situations in which the parties already have prepared a record to which they can readily refer. In the appellate case a record has been available to, and the precise facts and legal theories relied on by each party have been known by, both parties in the lower court and usually in at least one intermediate appellate court. The preparation of respondent's brief in such a case is largely a process of revising a brief already prepared for the lower courts so as to put it in the proper form for presentation to this Court.

How different the situation that faces the State of Texas here! There is no record. The State's effort to obtain a more definite statement of plaintiff's claims and thus narrow the possible issues has been denied. In the situation now presented in this original action, the Court's rules of time governing its appellate docket should not be applied; Rule 5 so recognizes; and the Court has consistently applied its appellate rules to original actions in which the United States or States were parties in such a manner as to promote complete fairness to all parties.

Moreover, we think that it is proper, if indeed it is not incumbent upon us, to say to the Court that we have enlisted the aid of some of the most highly respected living experts in the field of international

law, including Charles Cheney Hyde, Hans Kelsen, William E. Masterson, C. John Colombos of London, and Gilbert Gidel of Paris. Also Felipe Sanchez Roman of Mexico, former Spanish Minister of Justice and professor of civil law at the University of Madrid, has been engaged for more than a year in research in Spanish and Mexican law applicable to the ownership of these lands and minerals by the Republic of Texas. If the Court permits us to do so, we plan to present their testimony. As matters now stand (and if introduction of evidence is not allowed) we shall be remitted to their services in the capacity of advisory counsel, possibly supplemented by special memoranda to be submitted to the Court as prepared by them. But in fairness to these eminent authorities and to the Court, as well as to the parties, they should be allowed to deal specifically and directly with the contentions relied upon and advanced by the plaintiff. To this end, upon receipt of plaintiff's brief, we supplied each of them with a copy, *via* airmail. However, as the Court will understand, an exchange of communication with them, especially those resident abroad, requires a minimum of six days. And, obviously, they cannot be expected to speak until after being afforded a reasonable time in which to consider the brief, and to prepare with care their statements in reference to it. We apprehend that unless the extension herein requested is granted, the light that we have a right to expect from this source cannot be focused on the precise issues presented.

This Court has acknowledged the grave responsibility resting upon it in an original proceeding in which a State is a party, where the Court is per-

force cast in the role of trier of the facts and arbiter of the law, without appeal.

The statement from *Rhode Island v. Massachusetts* and *Iowa v. Illinois* above quoted and the deliberation with which the Court there proceeded are typical of the Court's judicial attitude in all such cases. Indeed, this Court's willingness to hear oral argument on the motion for leave to file the complaint in the present case was another manifestation of the judicial attitude to which we have referred. It is hardly necessary to suggest that the present emergency is fraught with consequences far more serious than those which existed at that preliminary stage.

With a due sense, we trust, of our responsibility at once to the Court and to our client, The State of Texas, we respectfully say to the Court that in the interest of justice the present motion should be granted.

Wherefore, defendant respectfully prays that plaintiff's motion for judgment on the pleadings be removed from the docket for Monday, March 27, 1950, and that the hearing be passed until Monday, May 1, or as soon thereafter as counsel may be heard.

Respectfully submitted.

PRICE DANIEL
*Attorney General of Texas*
J. CHRYS DOUGHERTY
K. BERT WATSON
*Assistants Attorney General*

ROSCOE POUND
JOSEPH WALTER BINGHAM
MANLEY O. HUDSON
JAMES WM. MOORE
*Of Counsel.*

March 9, 1950.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

No. 13, Original

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

## BRIEF FOR THE STATE OF TEXAS IN OPPOSITION TO MOTION FOR JUDGMENT

PRICE DANIEL
*Attorney General of Texas*
J. CHRYS DOUGHERTY
JESSE P. LUTON, JR.
K. BERT WATSON
DOW HEARD
WALTON S. ROBERTS
CLAUDE C. MCMILLAN
FIDENCIO M. GUERRA
MARY K. WALL
*Assistant Attorneys General*

ROSCOE POUND
JOSEPH WALTER BINGHAM
MANLEY O. HUDSON
JAMES WM. MOORE
*Of Counsel.*

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| Azuni, *Droit maritime de l'Europe* (Johnson's ed. 1806) | 102, 103 |
| 8 Bacon, *A New Abridgement of the Law* (Bouvier ed. 1869) | 96 |
| Bello, *Principios de Derecho de Jentes* (1832) | 104 |
| Bingham, *Report on the International Law of Pacific Coastal Fisheries* (1938) | 108 |
| 2 Blackstone, *Commentaries* (2d American ed. 1799) | 128, 172, 173 |
| Borchard, "Resources of the Continental Shelf," 40 *Am. J. Int. L.* 59 (1946) | 208 |
| Boucher, *Institution de Droit maritime* (1803) | 102 |
| Bynkershoek, *De Dominio Maris* (Magoffin's translation of 1844 ed.) | 67 |
| Chase, *Négociations de la République du Texas en Europe, 1837-1845* (1932) | 57 |
| Clark, "National Sovereignty and Dominion over Land Underlying the Ocean," 27 *Tex. L. Rev.* 140 (1948) | 164 |
| 5 *Cyclopedia of Federal Procedure* (2d ed. 1943) | 237, 239 |
| 8 *Cyclopedia of Federal Procedure* (2d ed. 1943) | 46 |
| Donaldson, *The Public Domain* (1884) | 166 |
| 1 Emory, *Report on the United States and Mexican Boundary Survey* (Washington, 1857) | 89 |
| 4 Fonseca y Urrutia, *Historia General de Hacienda* (1845 et seq.) | 120 |
| François, "*Règles générales du droit de la paix*," 66 *Recueil des cours, Académie de droit international* 1 (1938) | 206 |
| Galani, *Dei Doveri dei Principi Neutrali* (translated from 2d ed., 1942) | 101 |
| Gamboa, *Commentarios a las Ordenanzas de Minas* (1761) | 116 |
| Garrison, *Texan Diplomatic Correspondence*, 3 vols., Annual Report of the American Historical Association for the year 1907 (1908, 1911) | 55, 57, 76, 77 |
| 1 Gidel, *Le droit international public de la mer* (1932) | 206 |
| Gray, *Mining Coal Under the Sea in Nova Scotia with Notes on Comparable Undersea Coal Mining Operations Elsewhere*, 182 Canadian Mining and Metallurgical Bulletin 638 (1927) | 13 |
| II Günther, *Europäisches Volkerrecht* (1787) | 68 |
| 2 Hackworth, *Digest of International Law* (1941) | 205 |
| Hale, *Pars Prima, de Jure Maris et Brachiarum Eiusdem* (1670), reprinted in Hargrave's *Law Tracts* (1787) | 61, 127, 128 |

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Hall, *An Essay on the Rights of the Crown in the Seashore of the Realm* (1830) 96, 103, 104, 128, 129
Hautefeuille, *Des droits et des devoirs des nations neutres en temps de guerre maritime* (1848) 105, 106
Heffter, *Das Europäische Völkerrecht der Gegenwart* (1884) 105
Howe, *The Mining Guild of New Spain and Its Tribunal General*, 1770-1821 (1949) 116, 117
2 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2d rev. ed. 1945) 141, 142
Jessup, *A Modern Law of Nations* (1948) 157
1 Kent, *Commentaries on American Law* (1826) 67, 157
3 Kent, *Commentaries on American Law* (Holmes ed. 1884) 173
Lampredi, *Juris Publici Universalis sive Juris Naturae et Gentium Theoremata* (2d Italian ed., Cacchi, 1828) 101
Lares, *Lessiones de Derecho Administrativo* (1852) 120
Lauterpacht, *Private Law Sources and Analogies of International Law* (1927) 198
Lauterpacht, *Some Observations on Preparatory Work in the Interpretation of Treaties*, 48 Harv. L. Rev. 549 (1935) 142
Lindley, *American Law Relating to Mines and Mineral Lands* (1897, 1903, 1914) 117
8 Manning, *Diplomatic Correspondence of the United States, Inter-American Affairs* (1937) 55, 56
Martens, *Einleitung in das positive Europäische Volkerrecht* (1796) 66
Martens, *Précis du droit des gens moderne de l'Europe* (1789) 101, 102, 112
Martens, *Précis du droit des gens moderne de l'Europe* (Cobbett's ed. 1802) 101, 102
Martens, *Summary of the Law of Nations* (Cobbett's ed. 1795) 65, 66
4 Miller, *Treaties and Other International Acts of the United States of America* (1934) 76, 114
Model Code of Evidence, American Law Institute (1942) 49
Moore, *History and Law of the Foreshore and Sea Shore* (3d ed. 1888) 96, 97, 128, 129
1 Moore, *Digest of International Law* (1906) 86, 108
2 Moore's *Federal Practice* (2d ed. 1948) 44, 237, 239
3 Moore's *Federal Practice* (1st ed. 1938) 46
Morgan, *The Law of Evidence*, 1941-1945, 59 Harv. L. Rev. 481 (1946) 49, 50
3A Ohlinger's *Federal Practice* (rev. ed. 1948) 46
Person, *Mexican Oil* (1942) 119
Pratt, *Petroleum on the Continental Shelves*, 31 Bulletin of the American Association of Petroleum Geologists 657 (1946) 5
Price, *Evolution of Geologic Thought in Prospecting for Oil or Natural Gas*, 31 Bulletin of the American Association of Petroleum Geologists 673 (1946) 5
Ralston, *The Law and Procedure of International Tribunals* (1926) 138
Rayneval, *Institutions du droit de la nature et des gens* (1803) 68, 102
Riesenfeld, *Protection of Coastal Fisheries Under International Law* (1942) 65, 66, 89, 90, 108
1 Riquelme, *Elementos de Derecho Publico Internacional* (1849) 100
Rockwell, *Spanish and Mexican Law* (1851) 115, 116
Saalfeld, *Handbuch des Positiven Volkerrechts* (1833) 104

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|---|---|
| 2 Sala, *Sala Mexicano, o se La Ilustracion al Derecho Real de Espana* (1845) | 105 |
| Sellards, *Texas Through 250,000,000 Years* (1939) | 5 |
| Schmaltz, *Das Europaische Volker-Recht* (1817) | 67, 103 |
| Smith, *Law and Custom of the Sea* (1948) | 111 |
| 6 de Solorzanzo Periera, *Politica Indiana* (2d ed. 1702) | 120 |
| Story, *Commentaries on the Constitution* (5th ed. 1828) | 166 |
| 1 Thorpe, *The Federal and State Constitutions* (1909) | 166, 170 |
| 3 Thorpe, *The Federal and State Constitutions* (1909) | 166, 169 |
| Valin: *Nouveau commentaire sur l'ordonnance de la marine du mois d'aout* 1681 (1760) | 69 |
| Vattel, *Le droit des gens* (1758) | 63, 65, 108 |
| Vattel, *The Law of Nations* (Chitty's 1st ed. 183[illegible]) | 138 |
| Washburn, *Legislative Compact with Foreign Nations*, 55 Am. L. Rev. 68 (1921) | 136 |
| Wheaton, *Elements of International Law* (1836) | 105 |
| Wheaton, *International Law* (5th Engl. ed. 1916) | 137 |
| 9 Wigmore, *Evidence* (3d ed. 1942) | 48 |
| 5 Williams and Barker, *The Writings of Sam Houston* (1941) | 84 |
| Woolrych, *A Treatise on the Law of Waters and of Sewers, Including the Law Relating to Rights in the Sea* (1830) | 104 |


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| 5 Stat. 170 (1837) | 55 |
| 5 Stat. 797 (1845) | 80, 114, 140, 143, 151, 152, 153 |
| 8 Stat. 511 (1838) | 74, 75 |
| 9 Stat. 922 (1848) | 85, 185 |
| 10 Stat. 1031 (1853) | 185 |
| 42 Stat. 359 (1922), 43 U.S.C. § 697 (1946) | 207, 208 |
| 60 Stat. 241 (1946), 5 U.S.C. § 1006 (1946) | 51 |
| 61 Stat. 914 (1947), 30 U.S.C. § 352 (Supp. 1946) | 220 |
| 62 Stat. 891 (1948), 28 U.S.C. § 124 (Supp. 1946) | 62 |
| 62 Stat. 927 (1948), 28 U.S.C. § 1251 (Supp. 1946) | 225 |
| 62 Stat. 933 (1948), 28 U.S.C. § 1345 (Supp. 1946) | 225 |
| Public Law 66, 81st Cong., 1st Sess., ch. 128 (1949) | 221 |
| Fed. R. Civ. P. 12 (d) | 237 |
| Fed. R. Civ. P. 56 | 37 |
| 1 Laws, Republic of Texas 6 (1836), 1 Gamel's Laws of Texas 1066 | 53, 54, 61 |
| 1 Laws, Republic of Texas 17 (1836), 1 Gammel's Laws of Texas 1077 | 57, 58 |
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| 2 Laws, Republic of Texas 62 (1837), 1 Gammel's Laws of Texas 1404 | 59, 60, 62 |
| Laws, Republic of Texas, 4th Cong. 3 (1840), 2 Gammel's Laws of Texas 177 | 113, 125 |
| Laws, Republic of Texas, 5th Cong., Appendix, 1 (1841), 2 Gammel's Laws of Texas 655 | 56, 71 |
| Laws, Republic of Texas, 4th Cong. 3 (1840), 2 Gammel's Laws of Texas 880 | 56, 72 |
| Laws, Republic of Texas, 7th Cong. vii (1843), 2 Gammel's Laws of Texas 886 | 56 |
| Laws, Republic of Texas, 7th Cong. x (1943), 2 Gammel's Laws of Texas 889 | 56, 72 |

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| Laws, Republic of Texas, 7th Cong. xxvi (1843), 2 Gammel's Laws of Texas 905 | 56, 72 |
| Laws, Republic of Texas, 9th Cong. 4 (1845), 2 Gammel's Laws of Texas 1200 | 81 |
| Texas Acts 1846, 1st Leg., p. 25, 2 Gammel's Laws of Texas 1331 | 144, 145 |
| Texas Acts 1846, 1st Leg., p. 155, 2 Gammel's Laws of Texas 1461 | 82, 83 |
| Texas Acts 1848, 2nd Leg. ch. 151, p. 218, 3 Gammel's Laws of Texas 218 | 84 |
| Texas Acts 1850, 3rd Leg., ch. 2, p. 4, 3 Gammel's Laws of Texas 832 | 88 |
| Texas Acts 1856, 6th Leg., ch. 11, p. 11, 4 Gammel's Laws of Texas 191 | 186 |
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| Texas Acts 1917, 35th Leg., ch. 83, p. 158 | 60 |
| Texas Acts 1919, 36th Leg., 2nd C. S., p. 61 | 60, 122 |
| Texas Acts 1941, 47th Leg., ch. 286, p. 454 | 201; 205 |
| Texas Acts 1947, 50th Leg., ch. 253, p. 451 | 201 |
| Texas Civil Statutes (Vernon 1925) Art. 5421c-3, Sec. 2 | 123 |
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| 18 Am. Jur. 21 (1936) | 20 |
| Appendix to Cong. Globe, 28th Cong., 1st Sess. | 70, 78, 79, 140 |
| Appendix to Cong. Globe, 28th Cong., 1st Sess. | 79, 136, 140 |
| Appendix to Cong. Globe, 31st Cong., 1st Sess. | 87, 88, 175, 177, 178 |
| Argument, Motion for Judgment, United States v. California, No. 12, Original, October Term, 1946 (Reporter's Transcript) | 64 |
| Argument, Motion for Leave to File Complaint, United States v. Texas, No. 13 Original, October Term, 1949, (Reporter's Transcript) | 8 |
| Boundaries, Areas, Geographical Centers and Altitudes of the United States and the Several States, U. S. Dept. of the Interior, Geological Survey Bulletin §17 (2nd ed. 1930); House Document No. 113, 71st Cong., 1st Sess. | 90 |
| Brief for the State of California in Opposition to Motion for Judgment, United States v. California, No. 12, Original, October Term, 1946 | 33, 233 |
| Brief for the United States in Support of Motion for Judgment, United States v. California, No. 12, Original, October Term, 1946 | 9, 61, 64, 99, 111, 154, 155, 156, 164 |
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| Chronological Chart of Opinions of Jurists and Publicists, 1670-1950, Memoranda and Appendix, p. 18 | 5, 8, 22, 63, 64, 67, 96, 101, 106, 223 |
| Cong. Globe, 24th Cong., 2d Sess. | 35, 54, 55, 70 |

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Cong. Globe, 29th Cong., 1st Sess. 146
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95 Cong. Rec. (1949) 221
47 Decisions of the Dept. of Interior in Cases Relating to the Public Lands 372 (1921) 187, 188
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13 Dept. of State Bulletin 484 (1945) 28, 122, 201, 202, 211, 212, 217
Dept. State, 1 Communications from Agents of Texas, MS. National Archives 71
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Dept. State, 6 Notes to the Texas Legation, MS. National Archives 55
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5 Executive Journal (1837) 55
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General Land Office, State of Texas; Patent No. 633, Vol. 32, p. 633 186
General Land Office, State of Texas, Patent N. 633, Vol. 32, p. 633 186
General Letters, Dept. State, Domestic Letters 35, MS. National Archives 146
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Great Britain, Foreign Office, General Correspondence, Texas (F.O. 75), Vol. I, Sept.-Dec., 1840 72
Hearings Before the Committees on Interior and Insular Affairs on S. 155, S. 923, S. 1545, S. 1700, and S. 2153 (Reporter's Transcript), 81st Cong., 1st Sess. (1949) 7
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H. R. 180, Records of 29th Cong., 1st Sess., MS. National Archives 146, 147, 148
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H. R. 5992, 81st Cong., 1st Sess. (1949), 94 Cong. Rec. 5155 (1949) 171
H. R. 341, 81st Cong., 1st Sess. (1949) 16
H. R. Rep. No. 1788, 80th Cong., 2d Sess. (1848) 14, 15
Hyde Memorandum, Memoranda and Appendix, p. 12 17, 30, 31, 32, 134, 135
James K. Polk Papers, vol. 72, MS. Library of Congress 83
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Records of the Dept. of the Navy, Naval Records Collection of the Office of Naval Records and Library: Miscellaneous Letters Received, July, 1846, MS. National Archives ..... 15
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# Supreme Court of the United States

OCTOBER TERM, 1949

No. 13, Original

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

## BRIEF FOR THE STATE OF TEXAS IN OPPOSITION TO MOTION FOR JUDGMENT

## QUESTIONS PRESENTED

1. Whether, in the exercise of its original jurisdiction and on a good faith showing by the State of Texas of a genuine controversy as to facts which will aid the Court in arriving at its final determination of the ultimate issues of both fact and law, this Court should sustain plaintiff's motion for summary judgment on the pleadings and thereby foreclose the defendant State from offering its evidence at trial on the merits.

2. Whether, under the circumstances stated in Question 1, the United States is now entitled as a matter of law to an adjudication that it is the owner and has the exclusive right to take and enjoy the complete benefit and economic use (as distinguished from its undisputed paramount governmental powers of regulation, control, defense, etc.) of the lands, minerals and other resources underlying the Gulf of Mexico within the boundaries of Texas.

## STATEMENT

The development of the suit before the Court, involving rights to the lands, minerals, and other things underlying the Gulf of Mexico within the boundaries of the State of Texas, is set forth in plaintiff's statement of the case. On the basis of the pleadings, the ultimate issue on the merits is whether the United States has, as against Texas, the ownership and exclusive economic use and right to take and enjoy the complete benefit of the lands, minerals, and other resources lying beneath the Gulf of Mexico within the boundaries of Texas.

Sitting as a court of original jurisdiction in the case at bar, this Court is the trier of both the facts and the law. The present hearing before the Court is not, however, a trial on the merits. The issue here is narrow. The Court has before it only a complaint, an answer, plaintiff's motion for judgment, and briefs directed thereto. There is no record. The plaintiff has not submitted its case for final adjudication. By its motion for judgment, plaintiff asks only an adjudication in its favor and, if this is denied, it reserves to itself "the right to trial on any issues of fact which cannot be resolved by judicial notice." Since on the plaintiff's motion for judgment on the pleadings all issues properly raised by the pleadings are resolved against the moving party, the questions presented relate (1) to the justice of sustaining plaintiff's motion for judgment in a case of this magnitude on the pleadings alone, and (2) to the desirability of doing so without allowing a full development of the evidence.

Defendant contends that the pleadings raise, and that in truth there are, genuine issues of material fact in dispute, and that it should be given an opportunity to develop fully its evidence at trial. Defendant has not moved for judgment, but now has pending its motions for appointment of a master and leave to take oral depositions.

In support of its opposition to plaintiff's motion for summary disposition, defendant will proceed to outline the nature of the case and the nature of its defenses, not for a determination on the merits, but merely to show in good faith the controverted issues on which it is entitled to make full development of the evidence at trial on the merits.

## NATURE OF THE CASE

### Extent of the Area in Controversy

The complaint alleges that the Federal Government "is the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark" and within the Gulfward boundaries of the State of Texas.[1]

The described area embraces 2,608,774 acres of shallow submerged lands which have been within the statutory boundaries of Texas since the first session of the Congress of the Republic of Texas in 1836.[2] This area extends from low-water mark

[1] Motion for Leave to File Complaint, page 5, Par. II.

[2] See Texas Boundary Act, Dec. 19, 1836, 1 Laws, Republic of Texas 133, 1 Gammel's Laws of Texas 1193. The area is described as "beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande. . . ."

along the coast to a line three leagues (nine marine miles) from shore. The area is shown within the boundary lines (in red) on first map opposite this page. The depth of the waters overlying the area runs from a matter of inches at the low-water mark to an average of 42 feet at the three-league line.[3]

In addition, the complaint includes that part of the continental shelf underlying the Gulf outside of Texas' original three-league boundary and between that boundary and the edge of the shelf.[4] This much larger area is beneath the "high sea" as distinguished from the "marginal sea" or territorial waters which cover the first area above described. It is delineated on the map opposite this page.

The relation of the total area to the overlying waters and the mainland is shown on the cross-section map opposite this page. This map shows the vast substance of the subsoil as compared with the waters above. It also illustrates that the formations of the subsoil beneath the adjacent Gulf are the same as those beneath the uplands. They are extensions of the subsoil strata and perhaps indicate why practically all international law publicists and jurists treat the bed and subsoil of the adjacent sea as an extension of the continental land mass subject to the same laws of ownership and territorial sovereignty as the uplands. The accepted theory, at least since 1670, has been that the pearls, oysters,

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[3] The average depth at ½ mile from shore is 13 feet; at 1 mile, 18 feet; at 2 miles, 26 feet; at 3 miles, 29 feet; at 6 miles, 36 feet; and at 9 miles, 42 feet. See U.S. Coast and Geodetic Maps, Texas Coast.

[4] This area was included within the State's boundary extension acts of 1941 and 1947. Acts 1941, 47th Leg., Ch. 286, p. 454; Acts 1947, 50th Leg., Ch. 253, p. 451.

sponge, kelp, and other sedentary marine life, and the minerals beneath the bed, can be owned, developed, used, and enjoyed so long as there is no interference with paramount public rights in the overlying waters.[1]

The Mainland-Gulf cross-section also indicates the geologic ages during which this subsoil has been built up. For instance, practically all of the area shown on the cross-section was once covered by the waters of the sea.[2] In the beginning of the miocene age the sea covered the area now known as Texas almost as far north as Austin (200 miles from the present coast line). The present area covered by the Gulf along the shore is being built up by alluvial deposits from the streams emptying into the sea and by the sands of the sea at the rate of several inches each year. Geologists say that much of the entire area here in controversy will some day lie wholly above the waters of the sea as a result of these forces of nature. Other portions will, of course, be filled more rapidly by artificial means, as in the past, for useful purposes.

The accepted theory of the organic origin of oil is that it was formed in the earth from the remains of marine plant and animal life buried in the sand, rock, and clay by sedimentary marine deposits during the various ages indicated on the cross-section referred to above.[3] The resulting substance is found

[1] See chronological chart of Opinions of Jurists and Publicists, 1670-1950, Memoranda and Appendix, p. 18.

[2] Dr. E. H. Sellards, *Texas Through 250,000,000 Years* (1939).

[3] Wallace E. Pratt, *Petroleum on the Continental Shelves*, 31 Bulletin of the American Association of Petroleum Geologists (1946) 657; Paul H. Price, "Evolution of Geologic Thought in Prospecting for Oil or Natural Gas," *Id.* at 673.

in the earth today beneath waters the same as beneath uplands and at approximately the same depths. Recoverable oil does not exist in migratory pools running beneath the earth's surface. It exists in the structures or traps of porous sand and rock and moves only by some extreme force of nature or when artificial forces are employed to extract the mineral substances from the rock or sands. The "ownership in place" doctrine therefore has a logical basis. It has existed in the law of Texas since Spanish Colonial days when the Mining Ordinance of New Spain, 1783, brought "semi-minerals, bitumens and juices of the earth," both discovered and undiscovered, into the direct ownership of the king while remaining beneath the surface of the soil. The property has been taxable the same as other real property in this State. This "ownership in place" doctrine in Texas was recognized by this Court in *Texas Railroad Commission v. Rowan and Nichols Oil Co.*, 310 U.S. 573 (1940). The concept is now followed in the property law of many of the States.

**Nature of the Rights in Controversy**

At issue in this case is the ownership of the subsoil resources and minerals or the right to develop, use, or dispose of them for profit. The right is described by plaintiff as "ownership" or "paramount rights in, and full dominion and power over" the property. However, to eliminate any misunderstanding which would otherwise be caused by confusion of the proprietary substance of this controversy

with governmental powers which are not in controversy, the plaintiff has properly termed it:

> "or whatever is the most accurate description of the right to take and enjoy the complete benefit of the mineral and other resources of the bed of the sea." (Plaintiff's brief, p. 16.)

In describing the nature of plaintiff's claim to the Senate Committee on Interior and Insular Affairs, Solicitor General Perlman was more specific:

> "Well, of course, it rests on the claim of title. If we ~~had~~ have no title, we are not entitled to it."*

The present case does not involve any rights to the overlying waters or the use of them. Both plaintiff and defendant recognize that neither the State nor the Federal Government, nor their grantees and lessees, may use or develop the subsoil resources in such manner as to conflict or interfere with public use of the waters or with the exercise of paramount governmental powers relating to defense, navigation, international relations, conservation, eminent domain, etc. To such extent, the ownership and beneficial use of the subsoil is a qualified right just as ownership of subsoil minerals under private lands is restricted by governmental rights and regulations which involve proration of production, conservation, safety, health, and eminent domain.

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* Hearings Before the Committee on Interior and Insular Affairs on S. 155, S. 1545, S. 923, S. 1700, and S. 2153, (Reporter's Transcript, Vol. 3), 81st Cong., 1st Sess. (1949) 88.

Although governmental powers may be employed in the original acquisition of this type of property the same as other proprietary substances, the governmental power (*imperium*) and the proprietary rights (*dominium*) do not become inseparable. Practically all publicists and jurists on the subject from 1670-1950 are in agreement that sovereignty and ownership are separable in the soil here in controversy the same as in the soil of the upland territory.[9]

Dean Roscoe Pound has developed this point and its application to the present case in a separate memorandum "*Rights Involved in United States v. Texas*," which is attached hereto at page 1 of the Memoranda and Appendix. Reference is thereto made for full treatment.

That the rights of substance here in controversy are subject to ownership severable from the paramount governmental powers which exist over the area has been recognized by counsel for plaintiff.[10] It was also implicit in a statement of the Court recognizing the power of Congress over the property involved in the *California* case.[11]

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[9] See Opinions of Jurists and Publicists, 1670-1950, Appendix, p. 18.

[10] Solicitor General Perlman, in answer to a question by Mr. Justice Reed at argument on the Motion for Leave to File the Complaint herein, said that if the United States owns the property, it could convey it to the States. His words:

> "Oh, yes, Congress could give whatever title it has, whatever rights it has, to the states." Argument, *United States v. Texas*, 1949, Reporter's Transcript, p. 6.

[11] In holding that the Attorney General was authorized to bring the suit, the Court said that alleged Congressional recognition of State ownership by negative acts and passage of a subsequently vetoed State ownership bill were ineffectual to limit the powers of the Attorney General to safe-

As stated in the Government's brief in *United States v. California*, 332 U.S. 19 (1947), ownership of this property is not a necessary incident of sovereignty or essential to the exercise of federal constitutional powers over the area. At page 89 of the brief it was said:

> "We do not argue that the effective exercise of the foregoing powers (national defense, commerce, international relations) granted to the Federal Government by the Constitution would be impossible without ownership of the marginal sea."

**Rights Not Involved**

In asserting its ownership of the subsoil and minerals in controversy, the State of Texas does not pre-

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guard "government rights and property." It added, however, the following statement: "An Act passed by Congress and signed by the President could, of course, limit the power previously granted the Attorney General to prosecute claims for the Government. For Articles IV, § 3, Cl. 2 of the Constitution vests in Congress 'Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' We have said that the constitutional power of Congress in this respect is without limitation. *United States v. San Francisco*, 310 U.S. 16, 29-30. Thus neither the courts nor the executive agencies, could proceed contrary to an Act of Congress in this congressional area of national power." (332 U.S. at 27.)

In stating that valuable improvements made in good faith under State titles are not ground for a different judgment, the Court added: "But beyond all this we cannot and do not assume that Congress, which has constitutional control over Government property, will execute its powers in such way as to bring about injustices to states, their subdivisions or persons acting pursuant to their permission. See *United States v. Texas*, 162 U.S. 1, 89, 90; *Lee Wilson & Co. v. United States*, 245 U.S. 24, 32." (332 U.S. at 40.)

tend to possess any rights which legally could be exercised or used in a manner which conflicts with or interferes with federal paramount governmental powers over the area. If this is not clear from defendant's answer, it should be made clear now. By its answer, the State intended to acknowledge all of the United States' governmental powers, (i. e., national defense, commerce, navigation, international relations, etc.) which are separable from and paramount to ownership of the subsoil and minerals.

Because of the navigable waters overlying the soil in controversy and because of the importance of those waters in interstate commerce, national defense, and international affairs, the State recognizes that its use and ownership of the subsoil is and can be further restricted and regulated when necessary for the proper exercise of those Federal functions. Because of these federal powers, the State or its lessees may be restricted from building structures in or over the waters or otherwise using them to reach the subsoil resources when such use would interfere with navigation, defense and other constitutional federal powers. There have been occasions when exclusive federal use of the waters for bombing ranges and navigation rendered use of the subsoil impossible by the State and its lessees.[12]

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[12] The United States Engineers have ruled that no derricks shall be built or operations conducted within waters 2,500 feet on each side of the Galveston ship channel because of possible interference with navigation. State lessees holding leases beneath these waters must tunnel or slant drill from the shore or else they simply cannot produce the minerals below this particular area. They bought the leases knowing that they were subject to existing and subsequent federal rules and regulations for the protection of navigation. Also, on June 1, 1949, the Department of Defense held

None of these paramount governmental powers is in controversy, because defendant does not claim to possess them and does not claim that its rights in the subsoil and minerals entitle it to retard or conflict with their exercise.

In fact, the Congress as early as 1899 provided a means by which federal officials could determine in the first instance whether structures and other operations in the beds of these waters shall be permitted because of non-interference with paramount governmental powers or prohibited because of possible interference.[1] This statute leaves the determination to the Chief of Engineers, Department of Defense, and provides that such activities shall not be carried on in the waters without his approval. This requirement has always been respected, and the approval obtained by the State and its grantees before building bridges and piers, drilling wells, conducting geophysical exploration, and filling or building upon lands nearest the shore. Evidence can be adduced at a trial on the merits to show that the State's ownership is not now being, and never has been, exercised so as to interfere with any exercise of the federal governmental powers which relate to the waters overlying the subsoil and minerals.

In this respect, there may be a difference between the issues drawn in this case and those placed in

[1] a hearing and thereafter restricted an area of the coastal waters 30 miles long and 10 miles wide (195,748 acres) for a bombing range. The result is that the State and its lessees must keep structures out of the waters and obtain the beneficial uses of the minerals below by tunneling or slant drilling from the shore or not at all until after the bombing range restriction has been lifted.

30 Stat. 1151.

controversy in the *California* case. The Court's reference to the State in that case indicates that California had left the impression it contended its claims were not subject to the superior governmental powers of the nation to regulate and control its activities in order to prevent conflict with national defense, navigation and commerce, or that the State itself claimed some of those powers. This Court said:

> "The State is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks." (332 U.S. at 35-36.)

That is why we have explained at length that as far as Texas is concerned, it does not seek any superior governmental power or sovereignty in this area which is delegated by our Constitution to the United States. It seeks only to continue exercising the rights concomitant with the ownership of the underlying subsoil and minerals just as it has been doing under our constitutional system for the past 100 years both here and beneath other waters and unsold lands within the boundaries of Texas.

That these proprietary rights of the State can continue to be exercised without interfering with the waters above is best illustrated by the fact that the wells now producing oil from beneath the bed of the Texas marginal belt do not even touch the waters. They are slant-drilled from the shore as indicated on the cross-section of Caplen Field opposite this page. The same practice has been used in under-sea min-

Turn to Card No. 1803 for Chart Appearing at This Spot.

ing for more than 100 years.[14] An example is the famous Lota coal mine off the coast of Chile which extends four miles beneath the Pacific Ocean. Its operation began in 1852. A cross-section of this mine is pictured on the reverse side of the second map opposite page 4 of this brief.[15]

Of course, when structures are necessary in the waters, Texas and its lessees respect the prior determination of the Department of Defense and United States Engineers before they are built.

It should be added also that the development of these minerals by the State has been in the same good faith that it has, since annexation to the United States in 1845, continued to lease, use, and sell the shell, sand, oysters, and other products of the soil without interfering with federal powers over the area.

Instead of conflicting with national defense, the State and its lessees have aided two war efforts by developing oil from these lands. True, during peace-

[14] English sea coal mines were worked as early as the reign of James I (1567-1625). Letter from British Ministry of Fuel and Power, March 3, 1950.) See: Gray, *Mining Coal Under the Sea in Nova Scotia with Notes on Comparable Undersea Coal-Mining Operations Elsewhere*, The Canadian Mining and Mefallurgical Bulletin (1927) 638.

[15] Other such under-sea mining operations include the Dielette, France, iron ore mines opened in 1888; Whitehaven, Cumberland and Lothians, Levin, Scotland, coal mines under the Irish Sea and under the Firth of Forth, respectively; Fife, Levin, Scotland, coal mines under Firth of Forth, now operating 3,253 yards under sea from shore; Northumberland and Durham coal mines under the North Sea; Inverness and Sydney coal mines of Nova Scotia, the latter extending 3½ miles from shore; John Darling and Burwood, New South Wales, Australia, coal mines under the Pacific; and the Schwager and Lirquén coal mines under the Pacific Ocean off the coast of Chile.

time the revenues, all of which are dedicated to the Texas Public School Fund, are considered the most important aspect of the lands to the State. However, during and since World War II, the finding and development of these oil reserves by State lessees have been most important to our nation.

Secretary of Defense Forrestal testified in 1948:

> "It is the view of the national military establishment that development of the tidelands areas should proceed as rapidly as possible and that all necessary action should be taken to permit rapid development of those areas. Delays in the development of the oil potential in the tidelands is considered contrary to the best interests of the United States from the viewpoint of national security. . . . I do wish to emphasize that undeveloped oil fields provide no power for the machines of either war or peace."[1]

The House and Senate Judiciary Committee Reports in 1948 concurred in this language:

> "The theory of establishing Government oil reserves by setting aside undeveloped areas has been discarded by practically all competent per-

[1] Joint Hearings Before the Committees on the Judiciary on S. 1988 and Similar House Bills, 80th Cong., 2d Sess. (1948) 607. The importance of the continuance of these operations is indicated by the fact that plaintiff has not sued any of the lessees who are developing and producing oil from the property either in Texas or in the California marginal belt. They are being allowed to continue their operations, and executive officials have recommended to Congress that Federal leases be given to those who held State leases prior to the California decision. The conflict in this case is not with private interests but with the State, which is carrying the entire burden, financial and otherwise, of this litigation.

sons who have studied the matter. The national military establishment is now in process of returning to the Interior Department for leasing to private interests under existing laws all Naval reserves areas except two which are developed or in the process of development."

Congress has never attempted to enter the field and there is not now any legislation, even with respect to the California marginal belt, under which Federal officials can lease or develop the minerals.[17]

Except for the foresight of the State and its lessees, this oil would not now be developed. Under Texas conservation laws, it is not hurriedly drained and disposed of. Oil wells are required to produce slowly in accordance with established rates of maximum total recovery. They average less than 100 barrels per day and average a producing life of 25 years. A well tapping the producing horizon this year means readily available oil for future emergencies in the years ahead.[18]

Development under both State and Federal leases is conducted by private lessees just as the govern-

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[17] Opinion M-344985, August 8, 1947, from the Solicitor of the Department of the Interior to the Secretary of the Interior; Letter opinion from Attorney General Tom C. Clark to the Secretary of the Interior, August 29, 1947.

[18] Testifying concerning the ability of the industry to make available oil needed in times of peace and war under the present policy of State control, former Secretary of Interior Krug said:

"They have done a miraculous job. I think they will continue doing a miraculous job, whether or not the United States gives up its ownership of these lands to the States." Report No. 1778, House of Representatives, 80th Cong., 2d Sess. (1948), by the Committee on the Judiciary on H. R. 5992.

ment has proposed for future leases on the California marginal belt.[19] The only difference is that the State of Texas, under a sealed-bid system, receives far more per acre from the lessees than the federal government receives under the Federal Mineral Leasing Act. 61 Stat. 914 (1947).[20]

In summary, Texas does not claim that its ownership of the subsoil and minerals entitles it to interfere with or retard any federal powers of regulation, control, defense, or diplomacy. Governmental powers are not involved in this lawsuit. Neither can plaintiff assert that national defense and the public interest is not being served by Texas' management and development of its properties.

## SUMMARY OF ARGUMENT

### I.

This case is not controlled by *United States v. California*, 332 U.S. 19. The State of California had no interest in its marginal belt other than that which it acquired from the United States. Texas, on the other

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[19] S. 923 and H. R. 341, 81st Cong., 1st Sess. (1949).

[20] Texas averages nearly $20 per care on its undeveloped submerged lands as compared with 25¢ per acre paid by the first applicant on Federal leases with similar terms. State rentals and royalties are also higher. Joint Hearings Before the Committees on the Judiciary, 80th Cong., 2d Sess., on S. 1988 and Similar House Bills, February-March, 1948, 1297. If the 350,000 acres of tideland leases sold by Texas prior to this suit for $7,000,000 had been let under the Federal Mineral Leasing Act, they would have cost the oil companies only $87,500. This makes it understandable why the pending applicants for Federal leases covering the same lands oppose continued ownership and operations by the State.

hand, as an independent nation, acquired full rights of sovereignty and ownership of the lands and minerals in the marginal belt within its borders and maintained its rights thereto for ten years prior to annexation to the United States. The United States has no interest in these lands and minerals except what it acquired from the Republic of Texas. Therefore, the United States in this case is in the same position as was occupied by California in the *California* case in so far as proprietary rights are concerned. The present case is necessarily governed by different issues of fact and law. In fact, plaintiff contends only that the *California* case is applicable here unless Texas "can show special reason for different treatment." Texas, being the original sovereign and proprietor over these lands and minerals, and not having ceded them to the United States, presents an entirely different case which requires entirely different treatment.

Unlike the situation presented in the *California* case where the basic facts were not in dispute and where neither party suggested any necessity for the introduction of evidence, the plaintiff has here raised issues of disputed fact, especially as to the intention of the parties to the Annexation Agreement, the determination of which are essential to disposition of the case on the merits. The distinct character of the issues presented, none of which were considered or passed upon in the *California* case, wholly differentiates the two cases. The differences are more fully summarized in the memorandum by Dr. Charles Cheney Hyde at page 12 of the Memoranda and Appendix in this brief.

II.

Plaintiff is not now entitled to judgment disposing of this case on the pleadings, and the motion for judgment should be denied. While the case on the merits is one of great magnitude and importance, the issue now before the Court is extremely narrow. This issue is whether a judgment on the pleadings should be rendered in favor of the United States without according the State of Texas the opportunity it has requested to develop fully its evidence at trial. The case is not ripe for adjudication. There is no record. The plaintiff has not submitted its case for final adjudication. It asks only an adjudication in its favor and, if this is denied, it reserves to itself the right to trial.

Following accepted modern principles of pleading, the complaint and answer contain broad allegations that develop only the ultimate issues, and these embrace mixed conclusions of law and fact. In effect the complaint alleges that the plaintiff is the owner of the lands, minerals, and other things in question and the answer controverts this. It is not disputed that the United States has paramount governmental powers over the area in question.

Plaintiff's motion should be overruled for the following reasons:

A. The pleadings having properly raised an ultimate issue of ownership or "whatever is the most accurate description of the right to take and enjoy the complete benefit of the mineral and other resources" (Plaintiff's brief, p. 16), questions of fact or mixed questions of law and fact are immediately apparent. We have found no reported case involving

a title or ownership claim which was disposed of on motion for judgment on the pleadings except when the parties stipulated their evidence or included it by mutual consent in their briefs. As hereinafter shown, this is both impracticable and impossible in this case.

B. In its brief plaintiff fails to challenge the sufficiency of defendant's answer. All of plaintiff's contentions are grounded upon its own conclusions of fact which defendant disputes, especially those concerning the intention of the parties to the Annexation Agreement.

C. An adjudication of the issuable facts cannot properly be made on the pleadings nor by application of judicial notice.

1. The motion is hypothetical in character, because the plaintiff does not assert that it is entitled to a judgment solely on the pleadings, nor to summary judgment by virtue of matters outside the pleadings, which it presents to the Court; and because the plaintiff does not specify what facts it would have the Court judicially notice nor even assure the Court that there are such facts. Instead, in its motion for judgment plaintiff reserves "the right to trial on any issues of fact which cannot be resolved by judicial notice." Plaintiff submits its case only for an adjudication favorable to it, and on an uncertain and hypothetical basis.

2. Plaintiff's motion cannot be sustained solely on the pleadings or as a summary judgment. Judgments on the pleadings and summary judgments are harsh procedures in that they foreclose a defendant from all opportunity to develop his defenses at trial.

In ruling on a motion for judgment based solely on the pleadings, all issues of fact and mixed issues of fact and law are resolved in favor of the non-moving party. Nor is a summary judgment for the plaintiff proper by virtue of matters dehors the pleadings, unless it is indisputably clear that there is no genuine fact issue and the plaintiff is, as a matter of law, entitled to judgment. Plaintiff fails by affidavits or otherwise to assure the Court that this is so. On the contrary, an analysis of plaintiff's and defendant's briefs demonstrates convincingly that a genuine fact controversy exists. Furthermore, a summary judgment is seldom proper in a case involving large public issues.

3. An adjudication cannot properly be now made by an application of judicial notice. The plaintiff has not given notice, as it is required to do under the doctrines of judicial notice, of the matters which it claims the Court must judicially notice and which entitle it to judgment; nor does it assure the Court that these facts exist. On the contrary, plaintiff's brief shows, and defendant's brief demonstrates in detail, that the issuable matters in this case are disputable and, under established principles of judicial notice, are, therefore, triable. It is not feasible for defendant to submit its factual case through the medium of a brief, due to the limitations of space, the short time afforded for preparation, and the impossibility of making an orderly and coherent presentation of its rights except through a trial record, followed by brief and argument directed thereto. Under the decisions of this Court, and the law as

stated by the authoritative commentators, the defendant is entitled to an opportunity to present its controverting testimony at trial.

D. The pleadings of the State denying ownership in the United States and claiming that Texas owns the lands and minerals, subject to paramount governmental powers, raise fact issues which should be developed to aid the Court in making its final conclusion on the ultimate issues of fact and law in this case. In order to demonstrate the necessity for full development of the evidence, the State outlines the nature of its defenses. They are not submitted for a determination on the merits but only to show its good faith in requesting a trial at which evidence can be heard. This is consistent with defendant's motion for appointment of a master on the day it answered. That motion is now pending.

1. a. As an independent nation, the Republic of Texas acquired ownership of the submerged lands and minerals within its three-league marginal belt by establishing and maintaining that area within its statutory boundaries from 1836 to 1845. The Republic made its boundaries known to the United States and other major nations of the world before being recognized by them, and no objection was made to its seaward limits. The boundary was reasonable, accepted by other nations, and maintained and protected by the Texas Navy. The boundary was read to both Houses of the United States Congress before recognition and before annexation, and Texas officials insisted that the boundaries be maintained and protected by the United States as a part of the Annexation Agreement. During the negotiations, Pres-

ident Polk advised General Sam Houston of Texas that the United States would "not allow the Texan rights of territory to be sacrificed." On the same subject, President Polk wrote A. J. Donelson, negotiator for the United States: "Of course, I would maintain the Texas title to the extent which she claims it to be."

The United States later officially recognized the Texas three-league boundary and followed it in establishing the line between the United States and Mexico in the Treaty of Guadalupe Hidalgo in 1848. Plaintiff pretends not to question the validity of the boundaries but does question their effect and recognition. Plaintiff contends that the concept of ownership of the bed of a marginal belt within seaward boundaries had not been fully developed by 1836-1845. This is contrary to the position taken by the United States in the *California* case when it was seeking to establish that the concept had developed sufficiently to enable it to have obtained the ownership of the California marginal belt from Mexico in 1848. It is also contrary to the opinions of all jurists and publicists who wrote on the subject between 1670 and 1845, as well as practically all writers on the subject since 1845. (See chronological chart of Opinions of Jurists and Publicists, 1670-1950, Appendix, p. 18.)

Not only was Texas' ownership to the property established in accordance with international law, but the Congress of the Republic of Texas extended its domestic law over the area. Under its mineral law, inherited from Spain and Mexico, the Republic of Texas held a separate estate in the mines and min-

erals beneath the lands, whether private, public, or common, within its boundaries. This mineral law was specifically retained as an exception when Texas adopted the common law in 1840. The separate mineral estate definitely extended beneath the marginal belt within its boundaries the same as beneath all other waters and uplands. It included oil and other "juices of the earth," and this separate estate in the land in controversy has been maintained continuously under Texas laws and is now vested in the Permanent School Fund of the State of Texas.

If there was any doubt about its ownership of this property prior to 1840, it was removed when Texas adopted the common law in that year. Without question, the common law provided for sovereign ownership of lands beneath the marginal sea and all other navigable waters within its borders.

In any event, the Republic of Texas acquired at least all proprietary rights in the area which plaintiff contends that the United States acquired in the marginal belts of the original thirteen States by exercising national dominion thereover. (*United States v. California, supra.*) These proprietary rights have been recognized by plaintiff, by this Court, and by practically all jurists and publicists from 1670 to 1950 as being separable from governmental powers over the area. (See full discussion of this point by Dean Roscoe Pound at page 1 of Memoranda and Appendix in this brief.)

b. Prior to annexation the Republic of Texas had offered to transfer to the United States all of its territory, including lands, mines, and minerals, if the United States would assume the Texas debt of ap-

proximately ten million dollars. A treaty to this effect was signed by the presidents of the two nations in 1844, but it was rejected by the United States Senate. One of the main grounds of objection was that Texas lands were "worthless" and would never amount to enough to pay the debt. It was argued that Texas should keep its lands and pay its own debts. The same Congress therefore made a counter-proposal by a Joint Resolution which was accepted by the Congress of the Republic of Texas. It provided that Texas pay its own debts, and, after ceding certain types of listed property *then used* by the Republic for defense purposes, that the successor State should retain all "vacant and unappropriated lands *lying within its limits*, to be applied to the payment of the debts and liabilities of said Republic of Texas, and *the residue of said lands, . . . . to be disposed of as said State may direct. . . .*" Plaintiff in its brief makes many erroneous assumptions and conclusions of fact concerning the meaning of this retention. Contrary to its interpretation in the *California* case that its retention of "public lands" in California included submerged lands of the marginal belt, the plaintiff here contends that "vacant and unappropriated lands" are synonomous with "public lands" and that their retention to Texas does not cover submerged lands of the Texas marginal belt. For more than a year counsel for Texas have been gathering letters, diplomatic correspondence, newspaper files, maps, and other documents from the National Archives, Texas Archives, and all other official and private sources possible on this question. It has an abundance of evidence and testimony which bear upon the inten-

tion of the parties to the Annexation Agreement and its subsequent interpretation by the State and the United States. This evidence will show a continuous chain of understanding and interpretation that the State retained all proprietary rights to the lands and minerals in controversy, and that no property was to be ceded to the United States except that which was later inventoried, conveyed, and accepted by United States officials as full compliance with the Agreement. These subsequent interpretations include letters and opinions of the Attorney General of the United States and the Secretary of the Interior, as well as the parties who actually negotiated the Agreement on behalf of the two nations. Defendant requests the opportunity to develop this and other evidence on fact issues which plaintiff admits in its brief to be involved in this case.

Plaintiff argues that the "equal footing" clause and the defense, boundary adjustment, and other national sovereignty clauses in the Annexation Agreement indicate that the lands in controversy were not intended by the parties to be included within "lands lying within its limits" retained by Texas. Plaintiff does not argue that these governmental powers are inseparable from the lands and minerals, but contends that they cast light on the intention of the parties with respect to these lands. Defendant is prepared to prove that the parties who negotiated this agreement in 1845 believed at that time that these and all other submerged lands within State boundaries were owned by the respective States even without being mentioned in a retention or granting clause. Letters, speeches, and other documents will

show conclusively that no one at the time made any contention that these lands would not belong to the new State. In fact, an application of the "equal footing" understanding of that day, especially in light of the Court's decisions which had then applied the sovereignty and equal footing doctrines to submerged lands, is fatal to plaintiff's interpretation of the intention of the parties. At that time, two Supreme Court decisions had been written holding that the States owned the lands beneath all navigable waters within their boundaries. The understanding of the parties at the time must be given controlling effect as to whether they meant what they said, or had something else in mind, when they agreed that Texas should retain all of the lands "lying within its limits."

Mines and minerals were originally included in the proposed cession to the United States in all drafts of the Joint Resolution until the final amendment which was adopted. It struck out "mines and minerals" from the cession and broadened the retention clause in favor of the State so as to read "vacant and unappropriated lands" instead of "public lands." Regardless of the fact issue attempted to be raised by the plaintiff as to the meaning of these terms, it is certain that the lands and minerals in question were never conveyed to the United States by the Annexation Agreement or otherwise and that all proprietary rights therein are held by the Permanent School Fund of the State of Texas.

c. The State also has affirmative defenses of prescription and estoppel which are not of the nature considered or passed upon in the *California* case.

Texas' prescriptive rights in these lands and minerals began while Texas was an independent nation and have continued under the same claim and possession by the successor State for 105 years after annexation. The State is entitled to introduce its evidence of this long-continued use and possession acquiesced in by the United States and other nations of the world, especially since plaintiff has contended that the land was not claimed or used until recently. The doctrine of prescription was applied in favor of Texas in a case which involved lands claimed by the United States in the New Mexico territory.

d. The estoppel defense, on which defendant is also entitled to introduce evidence, is not based on unauthorized acts of federal officials. Rather it is based upon acts of the Congress and the President of the United States in recognizing Texas' boundaries and ownership and agreeing to protect them both prior and subsequent to Texas' change of position as an independent nation.

e. As to that part of the land in controversy on the continental shelf beyond Texas' original three-league boundary, the United States has failed to show any title or interest that would entitle it to a judgment restraining the State of Texas from exercising its legislative powers in the regulation, control, and licensing of its own citizens in the exploration, development, and conservation of these lands. The Presidential Proclamations on the continental shelf were intended only as assertions of jurisdiction *vis-a-vis* other nations and therefore did not amount to an assertion or determination of rights as between the United States and Texas. Until Con-

gress enters the field with conflicting legislation, the State has the right to continue with its regulations. (*Toomer v. Witsell*, 334 U.S. 385 (1948); *Skiriotes v. Florida*, 313 U.S. 69 (1941.) This interpretation is confirmed by an Executive Order and a White House press release issued contemporaneously with the Presidential Proclamations on September 28, 1945, and published with the Proclamations in the Department of State Bulletin. The latter said:

> "The policy proclaimed by the President in regard to the jurisdiction over the continental shelf does not touch upon the question of Federal versus State control. It is concerned solely with establishing the jurisdiction of the United States from an international standpoint." (13 Dept. State Bull. (1945) 484.)

f. In any event, Texas should not be prohibited from exercising its legislative power to "preserve and regulate the exploitation of an important resource" within its borders, in the absence of conflicting national legislation. See *Toomer v. Witsell*, 334 U.S. 385, 402 (1948).

2. Plaintiff has attempted to raise fact issues on the value, claim, and use of these lands during and since the days of the Texas Republic; the customs and usages of nations as to the extent of boundaries and ownership of lands beneath the marginal belt; the intention of the parties to the Annexation Agreement; and many other issues which require that plaintiff's motion for judgment on the pleadings be overruled in order that defendant may have an opportunity to develop its evidence. Defendant has listed many of the fact assumptions or conclu-

sions relied upon by the United States in its brief. (See page 65 of Memoranda and Appendix included in this brief.)

3. The disputed character of the fact issues involved, the time element, and uncertainty of judicial notice, render it impossible for defendant fully to present the merits of its case through judicial notice alone.

E. The established practice of this Court in original actions is to allow full development at trial of all factual issues, unless as in *United States v. California*, 332 U.S. 19, 24 (1947), neither party suggests "any necessity for the introducing of evidence," or the facts are stipulated or otherwise agreed upon. Similarly, in the district courts a party is not foreclosed from the development at trial of any genuine fact issue; and particularly is this true in cases of public import. These principles should be applied to the case at bar because of its magnitude, public importance, and the genuine factual defenses of the defendant.

## III.

If the plaintiff's motion is not now overruled, its disposition should be deferred until the evidence is fully developed at trial in accordance with this Court's practice that original cases should go to issue and proof; and in accordance with the like practice in the district courts, under Federal Rule 12 (d), of deferring until a trial the issues of the character presented by plaintiff's motion. The important issues in this case require the coherent pres-

entation and full consideration of all the facts that can only be made and adduced at trial.

## ARGUMENT

### I. This case is not controlled by United States v. California.

This case involves the same type of land as that involved in the *California* case, but the history, evidence, and law relating to the ownership here in controversy are entirely different. Even the plaintiff does not contend that the *California* decision controls this case as a matter of law if Texas' defenses, different from those of California, are found to be valid.[22] Plaintiff offers the *California* case as a "*prima facie* postulate," the principles of which are said to govern—"*unless a particular State can show special reason for different treatment.*"[23] **(Emphasis supplied throughout unless otherwise indicated.)**

The "special reasons" applicable here and the vital distinctions between the *Texas* case and the *California* case have been developed fully by Mr. Charles Cheney Hyde,[24] in a memorandum attached to this brief at page 12 of the Memoranda and Appendix. Reference is here made to his memorandum for a more complete statement of the differences between these two cases.

Briefly summarized, the State of California had no interest in the marginal belt involved in its case

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[22] Plaintiff's brief at 11, 20.

[23] *Id.* at 11, 20.

[24] Mr. Hyde is author of *International Law Chiefly as Interpreted and Applied by the United States* (2d rev. ed. 1945); former Solicitor for the Department of State; and Professor of International Law at Columbia, 1925-1945.

except what it had acquired from the United States under the laws and Constitution of the United States. California had not been an independent nation possessed of both sovereignty and property rights in the subsoil of its marginal belt. California based its claim mainly upon an interpretation of the effect of the equal footing clause in its Act of Admission.

On the other hand, Texas' rights and ownership accrued to it as an independent nation from 1836 to 1845. The Republic of Texas acquired both sovereignty and ownership in its own right in the subsoil and minerals beneath that part of the Gulf which it brought within its seaward boundaries on December 19, 1836. The United States has no proprietary interest in the marginal belt except what it acquired from the Republic of Texas *by force of* the Annexation Agreement. The question presented in this case is whether Texas transferred its ownership of these lands and minerals, or any interest of a proprietary nature therein, to the United States. Since they had been for ten years within the boundaries of and subject to the domestic law of the Republic of Texas prior to an annexation agreement which left them subject to the existing Texas boundary and property laws, there is no other source from which the United States could have obtained them. In 1845 the area was not subject to original acquisition by the United States through the application of external sovereignty. The national dominion and domestic law of a prior sovereign already extended over the area.

As said by Mr. Hyde, Texas, upon annexation, transferred to the United States "only its governmental powers of national sovereignty—*not its lands*

*or rights of substance theretofore acquired by its own use of those powers.*" (Hyde Memorandum, Memoranda and Appendix, p. 17.)

Plaintiff contends now for a different interpretation of the intention of the parties to the Annexation Agreement. By its implied admission that Texas must prevail if the intention of the agreement was that Texas retain this property, and by reliance upon conclusions of fact for its argument against that interpretation, plaintiff has demonstrated the vital difference between the *California* case and the *Texas* case more effectively than anything defendant might add.

In this case, there is a fact issue calling for a full development of all the evidence relating to the intention of the two independent nations in their concurrent adoption of this act of union. Plaintiff does not even contend that its interpretation can prevail as a matter of law, because by the express words of the agreement on its face Texas retains these and all other lands "lying within its limits," except certain enumerated types of defense property which did not include the lands and minerals in question. As is so well demonstrated in plaintiff's own brief, the United States' interpretation requires a determination of fact based upon extraneous evidence in order for it to prevail over the plain words of the agreement. Accordingly, defendant should be given the opportunity to refute that evidence with evidence of its own showing that the parties meant exactly what they said—that these lands and all proprietary claims thereto were retained by the new State, subject of course to the paramount *governmental powers* transferred to the United States.

Likewise, these circumstances show the necessity in this case for a different trial procedure from that agreed to by the parties in the *California* case. In that case there were no controlling fact issues involving the intention of the parties to a written agreement between nations nor were there the many years of history, negotiations, and subsequent construction relating thereto. The evidence which was thought material by California was originally set forth at length in a three-volume answer of 822 pages. This answer plainly did not comply with modern federal practice which requires a defendant to set forth its defenses in short and plain terms. As a result of plaintiff's Motion to Strike, California withdrew the evidence and its arguments on the law and the facts from its answer, and refiled them in a revised form as a two-volume brief in opposition to plaintiff's Motion for Judgment. The hearing in that case, while in form a motion for judgment on the pleadings, actually was by mutual understanding a trial on the merits, both fact and law, as shown by the briefs of the parties and the opinion of this Court. *United States v. California*, 332 U.S. 19 (1947).[21] As will be hereafter shown, it is impossible for the

[21] The foreword of California's brief said:

"The brief filed by plaintiff herein contains not only arguments upon the pleadings but is a presentation of its entire case, both upon the law and the facts. The State of California in its brief has met all the legal and factual issues presented by plaintiff and has also set forth the affirmative basis of California's title. The briefs and the oral argument, therefore, constitute the subject matter of an original trial of the cause on all issues, both of fact and law. The material contained in the appendix constitutes, in the main, the factual data which, in a case on appeal, would be contained in a transcript of evidence."

State in this case to make a full development of its evidence in its brief. It is not required to do so by the rules of procedure and decisions of this Court.

In summary, this case involves none of the fact issues raised by California in its case. Texas' defenses raise issues of law and fact not presented to, or decided by, the Court in that case; and the disputed fact issues are not now before this Court for adjudication.

That Texas possessed special defenses was responsibly and repeatedly acknowledged by the Attorney General of the United States in his testimony before Congressional Committees in 1948.[25] Mr. Justice Clark, then Attorney General, testified that on the day he argued the *California* case in Court, March 13, 1947, he handed to the press a written statement referring to other States. His statement concerning Texas was to the effect that Texas owned and retained all the lands within its boundaries, including the marginal sea area.[26] Solicitor General

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[25] Joint Hearings Before the Committees on the Judiciary, 80th Cong., 2d Sess. on S. 1899 and Similar House Bills, February-March 1948, 616, 617, 635, 689, 690.

[26] *Id.* at 689. The statement read: "Attorney General Clark today, in answer to inquiries regarding his Supreme Court appearance on behalf of the United States in the famous Tidelands Case emphasized the fact that the case involves only the area off the coast of California.

"...

"Whatever the decision of the court may be in the California case it would not be decisive as to the rights of any other state. . . . Other coastal states are on an entirely different footing.

"When asked regarding his native State of Texas, the Attorney General pointed out that Texas had been an independent nation, a republic, for ten years before joining the

Perlman, in testimony before the House Judiciary Committee, said:

> "As you know, Texas has special defenses that it is entitled to make that did not apply in the case of California."[27]

Relevancy of Texas' previous status as an independent nation has been similarly recognized by other executive officials.[28]

## II. Plaintiff is not now entitled to judgment disposing of this case on the pleadings and the motion for judgment should be denied.

### *Statement*

The plaintiff's motion for judgment is essentially a motion for judgment on the pleadings. For the pur-

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Union. As a republic it owned all of the lands within the boundaries, including the marginal sea commonly called tidelands. This area similar to that involved in the California case extended into the Gulf of Mexico and was under the sovereignty of Texas during the Republic and was retained by it under the provisions of the Act of Admission."

[27] Hearings Before Sub-Committee No. 1, House Judiciary Committee, 81st Cong., 1st Sess. on H. R. 5991 and H. R. 5992, August 29, 1949, Reporter's Transcript, Vol. 3, p. 373.

[28] *President Andrew Jackson:* "The title of Texas to the territory she claims is identified with her independence." Cong. Globe, 24th Cong.; 2nd Sess. (1836-1837), p. 45.

*President Harry S. Truman:* "Texas is in a class by itself; it entered the Union by Treaty." (Speech at Austin, Texas, September 20, 1948.)

*Former Interior Secretary Harold L. Ickes:* "Parenthetically, Texas may have the legal right to its tidelands because it came into the Union voluntarily and as an independent country." (Address over ABC Network, October 14, 1948.)

poses of this hearing it necessarily admits the well-pleaded material allegations of the defendant's answer and the fact elements necessary to support them.[29] In its complaint plaintiff has pleaded that it was and is now the "owner" in "fee simple" of, or possessed of "paramount rights" in, and full "dominion and power" over, the lands and minerals within Texas' gulfward boundaries.[30] Defendant was unable to obtain a more definite statement of plaintiff's claim.[31] It was therefore forced to deny this allegation in the same general terms subject, of course, to the admitted constitutional paramount rights of the United States.[32] It also pleaded three special defenses, each of which negatived plaintiff's claim of ownership.

This abbreviated form of pleading is permitted in United States District Courts under the Federal Rules of Civil Procedure and by analogy in this Court. Such pleadings develop ultimate mixed issues of law and fact. The only way that the substance of plaintiff's case and of defendant's defenses can be determined by the Court is through introduction of evidence at a trial or by submission to the Court of affidavits, depositions, admissions and other kindred forms of proof. No such proof has been submitted by either party thus far in the present case.

Therefore, the present hearing is not in any proper sense a trial. If the pleadings raise material fact issues which are in dispute between the parties, a

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[29] See p. 44, *infra*.

[30] Motion for Leave to File Complaint and Complaint, p. 6.

[31] See Plaintiff's Motion for More Definite Statement.

[32] First Amended Answer of the State of Texas, p. 4.

motion for judgment on the pleadings should be denied. By the same token the presence of these disputed questions of material fact make the rendering of summary judgment by analogy to Rule 56 of the Federal Rules of Civil Procedure likewise improper.[1]

**A. Plaintiff's Pleadings, Denied by the Defendant, Raise Ultimate Mixed Issues of Law and Fact on Which Full Development of the Evidence Should Be Had.**

The basic allegations of the complaint, such as "owner in fee simple," "possessed of paramount rights in and full dominion and power over," "trespass," and similar allegations are mixed conclusions concerning ultimate propositions of fact and law. The answer adequately controverts these mixed conclusions. It denies plaintiff's assertion of ownership and any other claims of a proprietary nature severable from governmental powers.

It is elementary that allegations of ownership or title when appropriately denied, as here, present a mixed question of law and fact.[2] As this Court said in *Richardson v. Boston*, 19 How. 263, 268 (1857), "Title is often a question of mixed law and fact. . . ." See also *Levins v. Rovegno*, 71 Cal. 273, 12 Pac. 161 (1886). In such a situation it was held to be error to grant a motion for judgment on the plead-

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[1] See p. 44, *infra*.

[2] See p. 45, *infra*.

ings in *McGrath v. Valentine*, 167 F. 473, 477 (1909), where the court said:

> "The answer denied the title of the defendant in error except as thereinafter stated, and it not only admitted no title in him, to any portion of lot 2, but it expressly alleged title in McGrath as to a certain described portion thereof, in which is included the land in that lot which by the judgment was awarded to the defendant in error. This was a distinct issue, as to which the plaintiffs in error were entitled to a trial by jury, and as to which it was error to enter a judgment for the defendant in error on the pleadings."

So in *Union Water Co. v. Crary*, 25 Cal. 509, 85 Am. Dec. 145, 147 (1864), where the dispute arose with regard to appropriation of the waters of a stream, the court said:

> "The plaintiff is not entitled to a judgment on the pleadings, for the defendant denies the right of the plaintiff, except where the water has receded to four inches, and he sets up title in himself; and we hold that those matters, as set up in the answer, do constitute a defense to the plaintiff's action."[28]

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[28] Accord: *J. D. Best & Co. v. Wolf Co.*, 67 Colo. 42, 185 Pac. 371 (1919); *West v. Bank of Commerce & Trust*, 153 F. (2d) 566, 568 (C.C.A. 4th 1946); *Mills v. Hart*, 24 Colo. 505, 52 Pac. 680 (1898); *Hicks v. Lovell*, 64 Cal. 13, 27 Pac. 942, 943 (1883); *Johnson v. Manning*, 3 Idaho 352, 29 Pac. 101, 102 (1892); *State v. Dilworth*, 70 Mont. 218, 246 Pac. 167 (1926) (citing cases from Nebraska, Michigan, Iowa, North Carolina, Illinois, and Georgia in support); *Rhoades v. McDowell*, 156 N. W. 526 (Ohio App. 1927).

The fact that in the present case there is a dispute over the intention of the parties to an international agreement bearing on the issue of ownership makes the application of the general rule here more compelling. Even where the dispute was over the meaning of certain private correspondence this Court has recognized the applicability of this rule. In *Rankin v. Fidelity Trust Co.*, 189 U.S. 242, 252-253 (1902), it said:

> "The case then really turned upon the actual ownership of the shares, and this question was properly left to the jury as one of fact. Although the construction of written instruments is one for the court, where the case turns upon the proper conclusions to be drawn from a series of letters, particularly of a commercial character, taken in connection with other facts and circumstances, it is one which is properly referred to a jury."[7]

In the case of *Morris v. United States*, 174 U.S. 196 (1898), the bill in equity alleged in part that the land in controversy was a part of the Potomac River subject to tidal overflow and was therefore reserved to the United States for public uses under the cession of 1839 from Maryland. The Court said in part:

> "By their answers the claimants under the patent denied these several allegations and un-

[7] See also: *United States v. Schurz*, 102 U.S. 378, 401, 402 (1880); *United States v. Northern Pacific Ry. Co.*, 152 U.S. 284, 291-292 (1893); *Hill v. McCord*, 195 U.S. 393, 400 (1904); *Worth v. Standard Oil Co.*, 278 U.S. 200 (1929). *Cf. Curtner v. United States*, 149 U.S. 662, 673 (1892); *United States v. King & Cox*, 7 How. 833 (1849); *Colorado Coal & Iron Co. v. United States*, 123 U.S. 307 (1887); *Pedro & Cañon del Agua Co. v. United States*, 146 U.S. 120 (1892); *United States v. Chaves*, 159 U.S. 452 (1895).

der the issues of law and fact thus raised, a large amount of evidence was taken." (174 U.S. at 233-234.)

By a parity of reasoning the ownership or paramount proprietary rights in the lands and minerals in controversy depend upon mixed questions of law and fact.

In summary the material allegations of the complaint, properly put in issue by the answer, present on their face broad propositions embracing mixed questions of fact and law, and therefore the motion for judgment on the pleadings should be overruled.

**B. Plaintiff Does Not in Its Brief Challenge the Sufficiency of Defendant's Pleadings but Clearly Raises Issues as to Material Facts.**

The plaintiff in its brief has conditioned the judgment it seeks on its own interpretation of the intention of the parties to the Annexation Agreement, and particularly on its interpretation of the clause by which Texas retained all vacant and unappropriated lands. Nowhere in its brief does it contend that the answer is insufficient as a matter of law.

This becomes apparent upon reading plaintiff's Summary of Argument (Plaintiff's brief, pp. 11-18). Point I reads, "The principles of *United States v. California* govern this case." But the United States qualifies this in the following terms, "unless a particular State can show special reason for different treatment." (Plaintiff's brief, pp. 11, 20.) In Point II, the plaintiff proceeds to argue against what it recognizes would be, if sustained, a special reason for different treatment. While devoting two pages of its argument to Point I, it devotes 47 pages to Texas'

defenses without once contending that they are insufficient as a matter of law. The plaintiff first discusses the interpretation of the clause "vacant and unappropriated lands" and sets forth many conclusions of fact reached solely through its own inferential processes. The United States then contends that the status of Texas as an independent nation is immaterial but assumes the establishment of its prior interpretation of the Annexation Agreement as a necessary premise for the point. (Plaintiff's brief, p. 52.) Plaintiff concludes its discussion of Texas' defenses by again making its own interpretation of the intention of the parties to the Annexation Agreement, directing this discussion to "the 'defence' clause," "the 'equal footing' clause," "the 'boundary adjustment' clause," and "the 'proper territory' clause," as indications bearing upon such factual interpretation. As shown in plaintiff's brief and our subsequent discussion, plaintiff's interpretation cannot be sustained as a matter of law. The intention of the contracting parties to the Annexation Agreement and other treaties and agreements, as shown by surrounding circumstances, negotiations, and subsequent construction put upon these documents, is an ultimate fact issue which is controlling.

Plaintiff's own brief proves fatal to its position on this motion for judgment on the pleadings. Its substance and form can be searched from introduction to conclusion without finding statement or argument that Texas' defenses, if supported by proof, are invalid and unavailing as a matter of law. Therefore, the motion for judgment should be overruled in order that full development of the evidence may be had.

**C. An Adjudication of the Issuable Facts Cannot Properly Be Made Now in Plaintiff's Favor on the Pleadings nor by an Application of Judicial Notice.**

1. *Plaintiff's motion is hypothetical in character.*

The complaint and answer have framed the basic issues as to ownership of the lands and minerals in question. There is no record in the case. By the pending motion the plaintiff asks for judgment as a matter of law. This is in effect a renewal by the plaintiff of its earlier motion for judgment on the complaint, which this Court denied October 10, 1949. The theory of that motion was necessarily bottomed on the proposition that the defendant could present no triable issue and that as a matter of law the plaintiff was entitled to judgment. The theory of the pending motion is the same and can be sustained only if the plaintiff establishes that it is entitled as a matter of law (1) to judgment on the pleadings, qua pleadings; or (2) to summary judgment by virtue of matters dehors the pleadings, which it presents to the Court and which show that it is indisputably clear there is no genuine issue of triable fact; or (3) that by virtue of judicial notice all the facts can and must now be resolved in favor of the plaintiff.

For reasons subsequently set out, the first two propositions cannot be seriously maintained, and the plaintiff is apparently relying largely, if not exclusively, on the third proposition that all the issuable facts are subject to judicial notice. But it does not set out these facts. They remain indefinite.

And they are hypothetical because the plaintiff in its motion for judgment reserves "the right to trial on any issues of fact which cannot be resolved by judicial notice." Hypothetical, (1) because the plaintiff does not assert that it is entitled to a judgment on the bare bones of the pleadings, nor to summary judgment by virtue of matters which it presents to the Court; and (2) because it does not set out and state that there are certain facts (enumerating them) which entitle it to judgment, of which this Court can and must now take judicial notice and that, as a consequence, there is no triable issue notwithstanding those raised by the pleadings. Instead, plaintiff argues at great length in its brief about the facts and law and argumentatively draws mixed factual and legal conclusions. Indeed, while refraining from specifying the facts which plaintiff would have the Court judicially notice, and which would entitle it to judgment, plaintiff does not even assure the Court that there are such facts, but reserves "the right to trial" as quoted above. The plaintiff is not entitled to a second trial run on matters dehors the pleadings without clearly and definitely stating what those matters are, or that they do exist. And by virtue of the reasons and materials, which we subsequently set out in detail, the crucial question as to ownership involves disputed fact issues upon which the defendant is entitled to trial.

2. *Plaintiff's motion cannot be sustained solely on the pleadings or as a summary judgment.*

A motion by plaintiff for judgment on the pleadings can be granted only where the plaintiff states a

cause of action and defendant's answer fails as a matter of law to controvert at least one material allegation. Where the pleadings, qua pleadings, sufficiently raise an issue, the plaintiff is entitled to a summary judgment only where he shows the court that, although the pleadings raise a triable issue, it is, nevertheless, indisputably clear that there is no genuine issue of fact to be tried, and that as a matter of law plaintiff is entitled to judgment.

Possible issues arising on a motion for judgment on the pleadings are, for the purpose of the motion, resolved in favor of the non-moving party. *Clark v. Allen*, 331 U.S. 503, 516 (1947); *National Metropolitan Bank v. United States*, 323 U.S. 454, 456-457 (1945). Where a case proceeds to judgment on the pleadings, "... it is elementary that every uncontradicted allegation of fact by the unsuccessful party must be taken as true." *Postal Telegraph Cable Co. v. City of Newport, Ky.*, 247 U.S. 464, 474 (1918). These principles enunciated by this Court have been consistently applied by the lower Federal Courts.[37]

The answer is clearly sufficient as a pleading. This is virtually admitted by the plaintiff for, as shown above, nowhere in its brief does plaintiff attack the legal sufficiency of the defendant's answer. Under the decisions of this Court and the lower Federal courts plaintiff's motion cannot be sustained as a motion directed solely to the pleadings.

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[37] *Wittlin v. Giacalone*, 154 F. (2d) 20, 21-22 (App. D.C. 1946); *Blackmer v. Thatcher*, 145 F. (2d) 255, 259-260 (C.C.A. 9th, 1944), cert. den. 324 U.S. 848, *Friedman v. Washburn Co.*, 145 F. (2d) 715 (C.C.A. 7th, 1944); *Ulen Contracting Corp. v. Tri-County Electric Cooperative*, 1 F.R.D. 284 (W.D. Mich. 1940); 2 Moore's Federal Practice (2d ed.), ¶ 12.15.

Nor can plaintiff's motion be sustained as a motion for summary judgment by virtue of matters outside the pleadings. Nowhere does the plaintiff set out the facts upon which it relies for judgment. Had it done so, plaintiff still would not be entitled to foreclose the defendant from a trial unless it was indisputably clear that there was no genuine controversy as to those facts. Thus in reference to Rule 56, which governs summary judgment in the *nisi prius* district courts, this Court has stated that the rule "authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial," *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 627 (1944); and that "Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial when there is a bona fide dispute of facts between them." *Associated Press v. United States*, 326 U.S. 1, 6 (1945). And in *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 719 (1945), this Court stated that a summary judgment "must be taken to have held that, upon the pleadings and the affidavits, no genuine issue of material fact was presented." And it went on to affirm the judgment of the Court of Appeals, wherein Mr. Justice, then Judge, Minton, in reversing a summary judgment, had stated the conclusions in these terms:

> "The procedure for summary judgment was intended to expedite the settlement of litigation where it affirmatively appears upon the record that in the last analysis there is only a question of law as to whether the party should have

judgment in accordance with the motion for summary judgment. If there was any question of fact presented on the record in the proceedings for summary judgment, the motion could not be sustained." 140 F. (2d) 488, 490 (C.C.A. 7th, 1944).

The Courts of Appeals have consistently followed the foregoing principles set out by this Court and are in general agreement among themselves that a summary judgment may be granted only where it is indisputably clear that there is no genuine fact issue.[*] And, furthermore, this Court has recognized and stated that seldom will a summary judgment be proper in a case involving large public issues.

> "Judgment on issues of public moment based on such evidence [affidavits], not subject to probing by judge and opposing counsel, is apt to be treacherous. Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment. Modern equity practice has tended away from a procedure based on affidavits and interrogatories, because of its proven insufficiencies." *Eccles v. People's Bank*

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[*] See *Dewey v. Clark*, 13 F. R. Serv. 56c.41, Case 10 (Ap., D.C. 1950) (for an extensive and summarizing opinion); *Sarnoff v. Ciaglia*, 165 F. (2d) 167 (C.C.A. 3d, 1947); *Campana Corp. v. Harrison*, 135 F. (2d) 334 (C.C.A. 7th, 1943); *Lane Bryant, Inc. v. Maternity Lane, Ltd. of California*, 173 F. (2d) 559 (C.C.A. 9th, 1949); 8 Cyclopedia of Federal Procedure (2d ed. 1943) §§ 3502-13, especially §§ 3502, 3503; 3A Ohlinger's Federal Practice (rev. ed. 1948) 297-340, especially §§ 56[3] - [3.2], [6.2] - [6.4]; 3 Moore's Federal Practice (1st ed. 1938) § 56.04, and accompanying Supp.

*of Lakewood Village, Cal.*, 333 U.S. 426, 434 (1947). See also *Arenas v. United States*, 322 U.S. 419, 434 (1944).

In *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948), Mr. Justice Jackson stated: "The manner in which the case has thus far developed raises the question whether as a matter of good judicial administration this Court should attempt to decide these far-reaching issues on this record." He went on to hold that it should not so decide, and that the summary judgment should be vacated.

The plaintiff's motion cannot therefore be sustained as a motion for summary judgment on matters dehors the pleading unless all the facts which entitle the plaintiff to judgment can and may now be resolved in favor of plaintiff by judicial notice. To this proposition we now turn.

3. *An adjudication cannot properly be now made by an application of judicial notice.*

Nowhere does the plaintiff set out the facts which it claims this Court should judicially notice and which entitle it to judgment. Plaintiff's brief inextricably weaves factual inferences, which it asks this Court to accept, with its conclusions of law. The brief should not take the place of a record made at a trial. It is, as briefs normally are, a series of arguments on law as applied to facts, but subject to the following important exception. In the present case there is no trial record and plaintiff attempts to supply it through the medium of its brief. There is another factual side of the case which the

defendant will show to the Court immediately after the present discussion of judicial notice. It will suffice at this point, however, to note that there is a complete lack of clarity and concreteness as to what facts plaintiff claims are subject to judicial notice. And, as previously stated, because of the uncertainty as to the facts, which plaintiff claims the Court must now judicially notice, and because the plaintiff reserves "the right to trial on any issues of fact which cannot be resolved by judicial notice," plaintiff's motion is hypothetical in character. This posture of the case should now be borne in mind in considering the two authoritative theories concerning the doctrine of judicial notice and its proper application: the Thayer-Wigmore, and the Morgan theory.

Under the Thayer-Wigmore theory, which has been endorsed by such eminent jurists as Mr. Justice Cardozo[39] and Judge Learned Hand,[40] facts which a court may judicially notice do not for that reason become indisputable in the sense that they are not subject to rebuttal by evidence.[41] And according to this view notice must be given to the party against whom

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[39] *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937).

[40] *United States v. Aluminum Co.*, 148 F. (2d) 416, 446 (C.C.A. 2d, 1945).

[41] "That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. This is because the Court *assumes* that the matter is so notorious that it will not be disputed. But the *opponent is not prevented from disputing* the matter by evidence, if he believes it disputable." 9 Wigmore on Evidence (3d ed. 1940) § 2567. (Author's emphasis.)

the matter, claimed to be judicially noticeable, is to be used.[9] It is clear then that under this theory of judicial notice and its applicability the plaintiff cannot prevail for it has failed to give notice of the facts which it wishes this Court to notice judicially. And, more important, even if it had done so or is subsequently permitted to do so, the State of Texas is permitted by the Wigmore theory and leading cases[10] to dispute by evidence the matter to be judicially noticed.

Under the other theory, espoused by Professor Morgan, judicially noticeable matter may not be challenged by evidence; but recognizing the danger of the doctrine when so applied he offers the following safeguards, which are concurred in by the Model Code of Evidence of the American Law Institute.[11] Professor Morgan states "that (a) the doctrine shall not be applied unless the litigant against whom the judicially noticed matter is to be used is given notice and opportunity to be heard as to the propriety of taking judicial notice and the exact content of the matter to be noticed and that (b) the judge is bound to decline to take such notice if the matter is not clearly indisputable."[12] As to "indisputability" the learned author says, "Whether or not a given matter is beyond the realm of dispute may itself be a subject of dispute among reasonable men at any

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[9] *Id.* at § 2568.

[10] *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937); *United States v. Aluminum Co.*, 148 F. (2d) 416, 446 (C.C.A. 2d, 1945).

[11] Model Code of Evidence, American Law Institute, Rules 801-6.

[12] Morgan, *The Law of Evidence, 1941-1945*, 59 Harv. L. Rev. 481, 487 (1946).

given time or place and in such circumstances, the judge may require the parties to use the ordinary processes of proof."[18] Thus, it is equally clear that the plaintiff cannot prevail under the Morgan theory; for plaintiff failed to specify "the exact content of the matter to be judicially noticed," and had it done so, the State of Texas would be entitled to challenge both the propriety of judicially noticing the matter and its "indisputability."

This Court as long ago as 1875 laid down a sound rule as to the use of judicial notice. "This power is to be exercised by Courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative." *Brown v. Piper*, 91 U.S. 37, 43 (1875). And this Court followed the "Thayer-Wigmore theory" in *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292 (1937). In this case the commission, in making a valuation of the utility's property, took judicial notice of price trends without placing the source of and the data in the record, and without giving the defendant company a chance to introduce rebutting evidence. Although, on review, the Supreme Court of Ohio approved the commission's action, this Court found a denial of procedural due process because of the lack of opportunity to challenge the judicially noticed matter either at trial or upon judicial review in the state court. This Court said that to press the doctrine of judicial notice to matters not "notorious to the community" and to the extent attempted, "would be to turn the doctrine into a pretext for dis-

[18] *Id.* at 485.

pensing with a trial." Justice Cardozo, who wrote for the Court, stated: "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." 301 U.S. at 305. This Court's treatment of judicial notice in the *Ohio Bell Telephone* case has received the express approval of Congress in relation to federal administration procedure by the enactment of Title 5, U.S.C., § 1006(d).

Let us assume for the moment that the matters of fact to which the plaintiff refers in its brief are within the general realm of judicial notice. That means only that the plaintiff will not be called upon to prove them if the Court actually knows that they are true, or if they are not denied. It does not mean that they are to be taken as conclusively true in any event if the defendant elects to disprove them. Note that it is not for the plaintiff or even the Court to say that defendant shall not be permitted to disprove them. The option is with the defendant to disprove them if he can. This is of the essence of a trial. "Moreover," said Justice Cardozo, "notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. Wigmore, *Evidence*, § 2567; I Greenleaf, *Evidence*, 16th ed., p. 18. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.'" 301 U.S. at 301-302.

Further, the doctrine of judicial notice operates with one effect upon the party who invokes it and a distinct effect upon the party against whom it is

employed. The plaintiff, for example, resorting to it in lieu of the normal methods of making proof, should lay before the court the substance of the facts that are said to be properly noticeable; failing to do this, he leaves his burden undischarged. But the defendant, upon whom the doctrine is sought to be imposed, is not similarly called upon to present his proof in that form at all. If he prefers he may, *of right*, invoke the normal functions of the Court that are essential to a trial. He may, if he sees fit, ask leave to present evidence. He is not bound to resort to the substitute method merely because the plaintiff has, for his part, chosen to do so.

The plaintiff is attempting to invoke the doctrine of judicial notice in a manner that does not meet the minimal standards set by this Court, nor the standards of either the Thayer-Wigmore or the Morgan school of thought. Accordingly, the State does here and now object to the consideration of the evidentiary material included in the plaintiff's brief for the purpose of sustaining plaintiff's motion for judgment and thereby foreclosing the defendant of an opportunity to present its controverting testimony at a trial on the merits.

**D. Defendant's Pleadings Raise Special Defenses Which Entitle It to a Full Development of the Evidence, and Otherwise Show that Plaintiff Is Not Entitled to Judgment.**

In order to demonstrate clearly the nature and materiality of the disputed fact issues which have been raised, that they may not be conclusively deter-

mined by judicial notice, and the necessity for an opportunity to develop its evidence fully, defendant will present a summary of the nature of its defenses. However, neither the law points nor the fact issues can be disposed of properly in this proceeding, and they are not presented here for final disposition on the merits. The purpose here is to show the substantial nature of the defenses require full development of the evidence rather than a present summary disposition.

## I. NATURE OF TEXAS' DEFENSES

### a. The Republic of Texas, as an Independent Nation (1836-1845), Owned the Submerged Lands and Minerals within Its Three-League Gulfward Boundaries.

Defendant contends that the Republic of Texas owned in proprietary right the seabed, subsoil, and minerals of the marginal sea belt embraced within its declared three-league boundaries, and that its right of ownership was distinct from, and in addition to, its right of sovereignty over the area "lying within its limits."

(1) *As an Independent Nation Texas Brought within Its Territory and Made Subject to Its Domestic Law the Shallow Marginal Belt of the Gulf Three Leagues from Shore.*

#### INDEPENDENCE

On March 2, 1836, a convention assembled for that purpose declared

> ". . . that the people of Texas do now constitute a free, sovereign, and independent re-

> public, and are fully invested with all the rights and attributes which properly belong to independent nations. . . ."[11]

Fifty days after this formal declaration of independence the Texan forces led by Sam Houston routed the Mexican Army at San Jacinto, on April 21, 1836. Thereafter and until annexation to the United States in 1845, the power and authority of the Republic of Texas as an independent nation in full control of its territory was unquestioned. The independence of Texas was successively recognized by the United States, France, The Netherlands, and Great Britain.

President Andrew Jackson in a special message to the United States House of Representatives on December 22, 1836, stated that

> "the title of Texas to the territory she claims is identified with her independence,"[12]

and the United States Senate on March 1, 1837, adopted a resolution formally recognizing Texan independence.[13] The resolution was introduced by Senator Walker of Mississippi on January 11, 1837, and was accepted as originally submitted by him.[14] It read:

> "Resolved, that the State of Texas having established and maintained an independent Government, capable of performing those duties,

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[11] 1 Laws, Rep. of Texas, p. 6; 1 Gammel's Laws of Texas 1066.

[12] Congressional Globe, 24th Cong., 2d Sess., p. 15 (1836).

[13] *Id.* at 270.

> foreign and domestic, which appertain to independent Governments, and it appearing that there is no longer any reasonable prospect of successful prosecution of the war by Mexico against said State it is expedient and proper and in conformity with the laws of nations and the practice of this Government in like cases, that the independent political existence of said state be acknowledged by the Government of the United States."

Congress passed an appropriation on March 3rd of that year for the salary of a diplomatic agent to Texas.[90] Alcée La Branche was confirmed by the Senate on March 7th for the post of charge d'affaires to the Republic of Texas.[91] Prior to that time the Republic had commissioned a minister pleniponentiary to the United States in November and December, 1836. He was formally received in July, 1837.[92]

Daniel Webster, Secretary of State of the United States, writing to the Mexican Minister in 1842, said:

> "From the time of the battle of San Jacinto in April 1836, to the present moment, Texas has exhibited the same external signs of national independence as Mexico herself, and with quite

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[90] *Id.* at 83.

[91] 5 Stat. 170 (1837).

[92] V Executive Journal 17 (1837).

[93] See I Garrison, George P., *Texan Diplomatic Correspondence*, 3 vols. published in Annual Report, American Historical Association 1907, 1908 (G.P.O. 1908, 1911) (hereafter referred to as "Garrison"), pp. 140-144; *Id.* at 165-166; Dept. State, 6 Notes to the Texas Légation 1-2, March 13, 1837; I Garrison 236.

> as much stability of government. Practically free and independent, acknowledged as a political sovereignty by the principal followers of the world, no hostile foot finding rest within their territory for six or seven years and Mexico herself refraining, for all that period from any further attempt to reestablish her own authority over that territory . . . since 1837 the United States has regarded Texas an Independent Sovereignty, as much as Mexico. . . ."[54]

This letter was repeated by Secretary of State Buchanan in a letter to the Mexican Minister on November 10, 1845.[55]

France formally recognized the Republic of Texas on September 25, 1839, by a treaty of amity, commerce and navigation, the preamble of which said, in part:

> ". . . and which shall establish the formal recognition, on the part of France, of the Independence of the Republic of Texas. . . ."[56]

A year later on September 18, 1840, by a similar treaty the King of The Netherlands accorded the recognition of that country.[57] It was immediately thereafter, in November, 1840, that Great Britain made its recognition effective by concluding three treaties with Texas.[58] Each of these nations sent

[54] VIII Manning, *Diplomatic Correspondence of the United States, Inter-American Affairs* (Washington, 1937) 113-115.

[55] *Id.* at 178.

[56] Laws, Rep. of Texas, 5th Cong., Appendix, p. 1; 2 Gammel's Laws of Texas 655.

[57] Laws, Rep. of Texas, 7th Cong., p. xxvi; 2 Gammel's Laws of Texas 905.

[58] Laws, Rep. of Texas, 7th Cong., pp. i, vii, x; 2 Gammel's Laws of Texas 880, 886, 889.

diplomatic representatives.[88] Belgium also sent a diplomatic mission to Texas.[89]

A convention of friendship, commerce and navigation between the Republic of Texas and the Hanseatic Republic of Lubeck, Bremen and Hamburg was signed in Paris on April 17, 1844.[90] A letter of credence for Ashbel Smith as chargé d'affaires from Texas to Spain was sent to the Spanish Minister of Foreign Affairs on February 16, 1843.[91]

Thus the independence and national character of the Republic of Texas is a well-established historical fact which the plaintiff does not dispute.[92] By this suit, plaintiff, for the first time in the history of United States-Texas relations, questions the effect and the legal incidents which flowed from such independence.

### DOMESTIC LAW OF THE REPUBLIC OF TEXAS

By its constitution adopted March 17, 1836, the Republic of Texas declared:

> "That no inconvenience may arise from the adoption of this constitution, it is declared by this convention that all laws now in force in

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[88] The United States sent six chargés d'affaires, Garrison, *passim*; France, a chargé d'affaires and consuls, III *id.* at 1222, 1270, 1280, 1282, 1362; The Netherlands, consuls, III *id.* at 963, 1563; Great Britain, a consul-general and consuls, III *id.* at 820, 942, 949.

[89] The entire history of these negotiations between the Republic of Texas and several European powers is fully discussed in Chase, Mary K., *Négociations de la République du Texas en Europe, 1837-1845* (Paris, 1932).

[90] III Garrison 1569.

[91] *Id.* at 1514.

[92] Brief in Support of Motion for Judgment, pp. 7, 52.

Texas, and not inconsistent with this constitution, shall remain in full force until declared void, repealed, altered, or expire by their own limitation."[64]

This constitution thus continued in force the system of land laws and laws in regard to the ownership of subsoil mines and minerals which Texas inherited from the Republic of Mexico as successor to the Crown of Spain.

On December 19, 1836, the Congress of the Republic passed the following act:

"AN ACT To define the Boundaries of the Republic of Texas.

"Sec. 1. *Be it enacted by the senate and house of representatives of the republic of Texas, in congress assembled*, That from and after the passage of this act, the civil and political jurisdiction of this republic be, and is hereby declared to extend to the following boundaries, to wit: beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande, thence up the principal stream of said river to its source, thence due north to the forty-second degree of north latitude, thence along the boundary line as defined in the treaty between the United States and Spain, to the beginning: and that the president be, and is hereby authorized and required to open a negotiation with the government of the United States of America, so soon as in his opinion the public interest requires it, to ascertain and define the boundary line as agreed upon in said treaty."[65]

[64] 1 Laws, Republic of Texas, p. 17; 1 Gammel's Laws of Texas 1077.

[65] Laws, Republic of Texas, p. 133; 1 Gammel's Laws of Texas 1193-1194.

Texas thereby applied its sovereignty and domestic law to the seabed and subsoil of this area.

Plaintiff's interpretation of the Act of December 22, 1837,[66] under which the General Land Office of Texas was actually organized is wholly erroneous. Plaintiff makes the statement (brief, p. 47) that the Republic of Texas "does not appear to have made any claim to *ownership* of the marginal sea," and supports this by arguing that (a) the Republic did not administer these lands as a part of "public lands"; (b) the Land Office was organized on a county basis, and the coastal counties stop at the Gulf shore; and (c) the judicial districts included the counties, omitting provision for the marginal sea. (Plaintiff's brief, pp. 47, 48.) Defendant's proof will show that the Act of 1837, the first providing a comprehensive system for administering the public lands *then* made subject to sale, did not include lands under *any* navigable waters. No provision was made for sale of any of the Republic's lands under bays, marshes, salt water lakes, *or any navigable streams.* Under this deliberate policy, not only did coastal surveys stop at the shoreline, but all internal surveys stopped at the banks of navigable streams. The very same statute also provided:

> "All lands surveyed for individuals lying on navigable water courses shall front one-half of the square on the water course. . . ."

and further, that streams defined as navigable "shall not be crossed by the lines of any survey." 2

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[66] 2 Laws, Republic of Texas, p. 62; 1 Gammel's Laws of Texas 1404.

Laws, Republic of Texas, p. 62; Sec. 21, p. 70; Sec. 42, p. 76; 1 Gammel's Laws of Texas 1404, 1412, 1418.

These provisions have remained in force throughout the history of the Republic and the State. Art. 5302, R. S. 1925 (present statute). There has been no departure from the public policy reserving and excluding from sale lands underlying navigable waters, although sales have been made by direct legislative grant for public improvements.

By the Act of April 9, 1913, the State made provision for mineral development and the lease of mineral rights in public lands including, among others, fresh water lakes, islands, bays, marshes, reefs and salt water lakes. Gen. Laws, 33rd Leg. (1913), p. 409. But the Act made no provision for developing the beds of navigable rivers. Nor had such provision ever been made until the 1913 Act was amended by the Act of March 16, 1917, which added river beds and channels. Gen. Laws, 35th Leg. (1917), p. 158.

In 1919, the 1917 Act as to the development of islands, salt water lakes, bays, inlets, marshes and reefs owned by the State within tidewater limits, was supplemented by including provision for the development of "that portion of the Gulf of Mexico within the jurisdiction of Texas." Gen. Laws, 36th Leg., 2nd C. S. (1919), p. 61.

Properly understood, that is, when viewed against the background of the evidence which defendant will present on the merits, the administration of the public land system by the Republic of Texas furnishes no support for the contention that Texas failed to claim the lands within its boundaries, including those underlying the Gulf, but will fully support

Turn to Card No. 1803 for Chart Appearing at This Spot.

such claim in the same manner that other nations were asserting and maintaining their ownership to similar lands. The circumstances that the Republic of Texas elected to withhold from general sale its lands under navigable waters and its minerals in such lands is no evidence of disclaimer of the lands or the minerals. It is no more probative of a disclaimer or absence of claim of ownership than was inaction by Congress as to the submerged lands off California in the *California* case.[67]

The failure to subdivide the marginal belt into counties is not significant.[68] It is hardly to be supposed that without mentioning the boundaries of the Republic of Texas, and without referring to the Act of December 19, 1836, defining the boundaries of the Republic, the Texas Congress intended to amend that Act, or to surrender or abandon any of its territory. As a matter of fact, as shown by the 1837 map of the county boundaries of the Republic (opposite this page) less than half the State was divided into coun-

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[67] Brief of the United States in Support of the Motion of Judgment, *United States v. California*, No. 12, Original, October Term, 1946, pp. 185, 186.

[68] The common law on this subject was stated by Lord Hale, Chief Justice of England, in *De Jure Maris* as follows:

> "The narrow sea, adjoining to the coast of England, is part of the wast and demesne and dominions of the king of England, whether it lie within the body of any county or not." Hargrave's *Law Tracts* (Dublin, 1787), p. 10.

The contention of plaintiff was also refuted in *Manchester v. Massachusetts*, 139 U.S. 240, 263-264 (1891) wherein one of the parties contended "that the jurisdiction of a State as between it and the United States must be confined to the body of the counties. . . ."

ties, and county lines did not cross inland or coastal bays. It had as well be argued that the Republic did not claim the vast expanse of West Texas, part of which was later purchased by the United States under the compromise of 1850, or that it claimed no ownership of the beds and subsoil of the coastal inland water bays which were not included within county boundaries.

Neither is there merit to plaintiff's point (plaintiff's brief, p. 48) that judicial districts of the Republic of Texas consisted of named counties, without embracing, in terms, the area in the Gulf. As we understand it, the plaintiff does not contend that the marginal belt is not within the boundaries of Texas. We further understand that the plaintiff contends that the marginal belt is within the United States. The United States Court for the Southern District of Texas is comprised of named counties. Title 28, U. S. Code, Sec. 124 (b). It will hardly be conceded by plaintiff that by so limiting the district the Congress intended to disclaim the marginal belt within the district. In so describing judicial districts the Congress of the United States did not intend, and the Congress of Texas did not intend, to affect national boundaries or to delimit national territory. *Cf. United States v. Texas*, 162 U.S. 1 (1896).

Many maps, letters, and other evidence to be offered by the defendant will show conclusively that the Republic of Texas did claim ownership in the seabed, subsoil, and minerals within its boundaries, including those in controversy, and that there is no foundation for plaintiff's factual conclusion to the contrary.

## THREE-LEAGUE SEAWARD BOUNDARY WAS REASONABLE, ACCEPTED BY OTHER NATIONS, AND MAINTAINED BY THE TEXAS NAVY

Although the United States says that "no question is here raised as to the *boundary* of Texas." (italics theirs), plaintiff's brief does question the effect (pp. 7, 52), maturity (pp. 14, 15), recognition (pp. 45,47) and control over (p. 54) the three-league boundary of Texas. It is for this reason that we discuss this boundary of the Republic of Texas and, as shown later, of its successor, the State of Texas.

An examination of the international law chart will reveal the error of plaintiff's factual conclusion that the concept of a territorial or maritime belt was not generally accepted in 1845. All the authorities prior to 1845, beginning with Lord Hale in 1670 and ending with Sala in 1845, recognized a portion of the adjacent sea as being properly within the territory of a littoral nation. In 1758 Vattel wrote:

> "These parts of the sea are within the jurisdiction of the nation, and a part of its territory."[71]

[70] Brief for the United States, p. 7, note 3.

[71] Appendix, p. 18.

[72] Vattel, *Le droit des gens* (Leyden, 1758), Bk. 1, § 295, p. 130. Vattel was the accepted and most quoted authority on international law in the United States during the first 100 years of its history. For example, an examination of the Congressional Debates for the years 1789 to 1845 shows that Vattel was cited, quoted, or referred to as an authority on international law 91 times as compared with the next most frequently cited authority, von Martens, who was cited 24 times. The following tabulation is illuminating:

| | |
|---|---|
| Vattel | 91 |
| von Martens | 24 |
| Grotius | 17 |
| Pufendorf | 9 |
| Burlemaqui | 6 |
| Bynkershoek | 5 |

This concept of a territorial belt belonging to a littoral nation was also recognized by Molloy (1676), Pufendorf (1688), van Bynkershoek (1702), Moser (1750), Surland (1750), Hübner (1759), Valin (1760), Lampredi (1776), Toze (1780), Galiani (1782), Günther (1787), von Martens (1789), Nau (1802), Boucher (1803), Rayneval (1803), Azuni (1805), Jouffroy (1806), Schultes (1811), Schmaltz (1817), Schmelzing (1818), Klüber (1819), Holroyd (1821), Angell (1826), Lord Wynford (1829), Hall (1830), Woolrych (1830), Bello (1832), Saalfeld (1833), Wheaton (1836), Lucchesi-Palli (1840), Heffter (1844), and Massé (1844).

During the entire period the writers, American, English, German, Dutch, Swiss, Danish, French, Italian, Prussian, Mexican, and Venezuelan, were in agreement. We have found none to the contrary. There is not the slightest authority for plaintiff's contention that "In 1845, the conception of a maritime belt was very immature, and it did not achieve general recognition and formulation until later in the 19th century." [1] (Plaintiff's brief, p. 14.)

True, there was not then and is not now any maximum limit of the belt which may be incorporated within a nation's territory. The test was based upon reasonableness for the needs of the particular State

[1] See quotations from them in Opinions of Jurists and Publicists, Appendix, pp. 18-25.

It is significant that the United States took the contrary and correct view in its brief in *U. S. v. California*, p. 59, and its oral argument, Reporter's Transcript, pp. 26-27, when it recognized Mexican dominion over the California belt prior to 1845 and claimed that the United States obtained the property from Mexico in that year.

and its power to maintain its jurisdiction in the belt, the same as over land territory.

An examination of the writings of the publicists prior to 1845 also reveals that the distance of three leagues chosen by Texas as its seaward boundary was a reasonable limit. In this connection, Vattel said:

> "The dominion of the state over the neighbouring sea extends as far as her safety renders it necessary and her power is able to assert it."

Georg Friedrich von Martens wrote a Latin treatise in 1785 on the law of nations, later publishing a new work in French in 1789 and a German edition in 1796. His work was highly esteemed and progressed through many editions in both French and German. The French edition was translated into English by William Cobbett in 1795 and published in Philadelphia. As the translator stated in the second edition, the prior edition was subscribed for by all members of Congress. In that translation the following is found:

> "A custom, generally acknowledged, extends the authority of the possessor of the coast to a cannon shot from the shore; that is to say, *three leagues*, from the shore, and this distance is

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The most exhaustive treatise and accepted authority on the subject of extent of rights in marginal belts is Stefan A. Riesenfeld's *Protection of Coastal Fisheries Under International Law* (Washington, 1942). See Chapters I and II and Conclusion, p. 277.

Vattel, *op. cit. supra*, note 71, § 289, p. 128.

the least, that a nation ought now to claim, as the extent of its dominions of the seas."[76]

As said by Riesenfeld in his *Protection of Coastal Fisheries Under International Law*, pp. 26-27, "Martens even admitted that 'a nation may occupy, and extend its dominion, beyond the distance mentioned in the last section [three leagues] . . . and such dominion may, if national security requires it, be maintained by a fleet of armed vessels.' In consequence, he proceeded to an investigation as to whether and where such claims in Europe had been made and acceded to. 'Within the distance of three leagues,' he recognized the exclusive rights of the coastal state to all sea products."[77] He, like all

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[76] Von Martens, *Summary of the Law of Nations* (translation by Cobbett) 160. Von Martens is sometimes listed mistakenly as an advocate of the three-mile rule. Riesenfeld, in *Protection of Coastal Fisheries Under International Law* (1942) 27, discusses this question and, in the light of Martens' statements in later editions, proves that Martens meant three *leagues*. That this is correct is shown by the following footnote (translated) from Martens' German edition of 1796, *Enleitung in das positive Europäische Völkerrecht*, p. 46:

> "Pfeffel in *Principes du droit naturel*, bk. 3, chap. iv, sec. 15, indicates the distance of three leagues as the now universal principle. This principle is now incorporated in many treaties, even though no cannon reaches that far, especially over the sea."

[77] Riesenfeld says of Martens: "It is probably no exaggeration to state that G. F. von Martens gave the theory of international law a new direction. He was the great model of all continental writers in the century which followed the appearance of the first French and German edition of his work. Rivier calls him in his well-known *Esquisse d'une histoire littéraire des gens depuis Grotius jusqu'a nos jours*, the true originator of the systematic and scientific study of the positive law of nations." (p. 29).

other publicists of the 1670-1845 period and practically all since then, said the littoral state acquired both "empire" and "property" in that part of the sea brought within its territory.

The reasonableness of this limit chosen by the Republic of Texas is shown also by the following statements of other publicists of this period:

> *Schmalz*: "It is said that the sea must belong to the land as far as it can be defended from land, and that this extends as far as a shot from a cannon on the shore may reach; but this has since been fixed rather arbitrarily at three leagues."[78]
>
> *Kent*: "It is difficult to draw any precise or determinate conclusion, amidst the variety of opinions, as to the distance to which a state may lawfully extend its exclusive dominion over the sea adjoining its territories. . . . All that can reasonably be asserted is, that the dominion of the sovereign of the shore over the contiguous sea, extends as far as is requisite for his safety, and for some lawful end."[79]
>
> *Bynkershoek*: "The possession of a maritime belt ought to be regarded as extending just as far as it can be held in subjection to the mainland. . . ."[80]

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[78] Opinions of Jurists and Publicists, Appendix, p. 21.

[79] Schmalz, *Das Europäische Völker-Recht* (Berlin, 1817) 141.

[80] Kent, *Commentaries on American Law* (New York, 1826) 29.

[81] Bynkershoek, *De Dominio Maris* (tr. Magoffin, 1844 ed.) 14, in 11 *Classics of International Law* (New York, 1923).

*Günther:* "Every nation is allowed by nature to take in possession a part of the sea as well as of the land, as much, namely, as its preservation and perfection demand."[1]

*Rayneval:* "We might add that the bottom of the sea, along the coasts, can be considered as having been part of the continent, and that it is therefore considered as still forming part of it. But the extent of this ownership is not determined by a uniform rule; some carry it out to thirty leagues, *others only to three*; others fix it at the range of cannon placed on the seashore. Along the southern coast of France, the distance was ten leagues to the Barbary States."[2]

The State can present evidence which will show that members of the Congress of the Republic of Texas and other officials who had a part in the drafting or the adoption of the boundary act of December 19, 1836, had available to them many of the international law books of the period, particularly the writings of Martens and Vattel, which were most generally used in the United States. The State can also present evidence which will show that the person who was responsible for the drafting of the 1836 act declaring the boundaries of the Republic of Texas went first to the writings of the international law publicists to guide him in the drafting of this declaration.

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[1] II Günther, *Europäisches Völkerrecht* (Altenburg, 1787) 49.

[2] Rayneval, *Institutions du droit de la nature et des gens* (Paris, 1803) 161.

The above statement shows, and the writings of other publicists and other evidence which Texas can present will even more conclusively show, that the three-league boundary of the Republic of Texas was a reasonable boundary in international law at the time of its establishment and that subsequent development of international law concerning the proper limit of a nation's territorial belt has not in any way altered the reasonableness and validity of this boundary.

The State's evidence also will show that the limit of three leagues was a reasonable distance in the Gulf of Mexico off the coast of the Republic of Texas because of the unusually shallow depth of the water in that area.[1] This is important because of the view of some of the early publicists that the shallowness of the adjacent waters should be considered in determining the proper seaward limits of a littoral nation.[2]

With knowledge of the boundaries declared and claimed by the Republic of Texas, the United States, France, Great Britain, and The Netherlands formally recognized the Republic as a sovereign nation.

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[1] "The State is prepared to prove that due to the shallowness of this wat[illegible] the sailing routes off the coast of Texas for larger craft were not within three leagues. See average present depths shown on cross-section map opposite p. 4, *supra*.

[2] See Valin, *Nouveau commentaire sur l'ordonnance de la marine du mois d'août 1681* (1760) 638; "Others, finally, have taken for the rule the extent of sea which can be seen from the shore; but this measure being uncertain by its nature, it would have been better, perhaps, to reckon the domain over the adjacent sea by the sounding-lead, and to assign its limits exactly at that point where the lead ceased to fetch bottom; so that, outside soundings, the sea would have been recognized as free for navigation and fishing, as being incapable of belonging to any one's domain."

The United States was the first officially to recognize the independence of the Republic of Texas. On December 22, 1836, President Jackson presented to Congress a special message, indicating in the following language that a recognition of Texas' independence would be a recognition of its territorial claims:

> "The title of Texas to the territory she claims is identified with her independence. . . ."[86]

Subsequently, in the same session of Congress, the United States Senate, on March 1, 1837, adopted a resolution recognizing the independence of Texas.[87] (*Supra*, p. 54.)

This resolution was offered by Senator Walker of Mississippi. During the final debate on the resolution immediately prior to its adoption, Senator Walker acquainted the Senate with the boundaries of Texas by reading on the floor of the Senate the boundary act of December 19, 1836.[88]

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[86] Cong. Globe, 24th Cong., 2nd Sess. 45.

[87] Cong. Globe, 24th Cong., 2nd Sess. 270.

[88] In a speech in a secret session of the Senate on the treaty for the annexation of Texas to the United States, on May 21, 1844, Mr. Walker refers to the resolution adopted on March 2, 1837, saying: "As the author of the resolution, before it was adopted, I read to the Senate the boundaries of Texas, as described in her organic law, claiming it also as the ancient boundaries of Louisiana; and, with the full knowledge of these facts, the resolution was adopted. In our subsequent treaties, and those of Great Britain, France, and Holland, she is described as 'the republic of Texas' and her independence fully recognized. If, then, as contended by the senator from Missouri, the mere name (the republic of Texas) in a treaty adopts the boundaries described in her organic law, not only have we recognized the Del Norte as the rightful boundary of Texas, but also have Great Britain, France, and Holland." (Appendix to the Cong. Globe, 28th Cong. 1st Sess. 549.)

At the appropriate time, Texas will present other evidence to show that the United States recognized the boundaries of the Republic of Texas when it recognized the independence of the Republic, and that these boundaries were also known to and accepted without objection by other nations prior to recognition and treaties of commerce and amity.[88]

On September 25, 1839, a treaty of amity, commerce and navigation was concluded between the Republic of Texas and France.[89] The preamble contained the following:

> "The President of the Republic of Texas, and his Majesty the King of the French, . . . have resolved to conclude a Treaty of Amity, Navigation and Commerce, . . . which shall establish the formal recognition on the part of France, of the Independence of the Republic of Texas. . . ."

Article 2 began:

> "The French and Texians shall enjoy, in their persons and property, in the entire extent of their respective territories, the same rights, privileges, and exemptions, which are or may be granted to the most favored nation. . . ."

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[88] It was agreed by the United and the Republic of Texas that the Treaty of Amity, Commerce and Navigation of April 5, 1831, between the United States and Mexico would continue between the United States and Texas, "subject to termination by either party on one year's notice from and after April 15, 1840." Dept. State 1 Communications from Agents of Texas; see, also, 1 Instructions, Texas, 31-33, June 14, 1841.

[89] Laws 1841, Rep. of Texas, 5th Cong., Appendix, p. 1; 2 Gammel's Laws of Texas 655.

On September 18, 1840, a treaty of amity, commerce and navigation between the Republic of Texas and The Netherlands was concluded.[91]

On November 13, 1840, a treaty of commerce and navigation was concluded between the Republic of Texas and Great Britain.[92] In a proposed draft of a convention submitted to the Queen's Advocate for opinion by the direction of Viscount Palmerston on November 13, 1840, whereby Great Britain would act as a mediator between Texas and Mexico, the boundaries declared by the Republic were set out.[93] A third treaty concluded between the Republic of Texas and Great Britain was one providing for the suppression of the African slave trade.[94]

A further fact showing that the recognition of the independence of the Republic of Texas was a recognition of its declared boundaries is that there was no protest by the United States or any other nation against the boundaries proclaimed and maintained by the Republic of Texas.

The unconditional recognition of the independence of the Republic of Texas by the United States and

[91] Laws, 1843, Rep. of Texas, 7th Cong., xxvi; 2 Gammel's Laws of Texas 905.

[92] Laws 1843, Rep. of Texas, 7th Cong., i; 2 Gammel's Laws of Texas 880. Article 4 of this treaty admits reservation by Texas of coastal trade.

[93] Foreign Office, General Correspondence, Texas (F. O. 75). Vol. I, Sept.-Dec., 1840, pp. 108-111. Article 3 provided: "That her Britannick Majesty in order to give all possible rapidity and effect to the stipulations and agreement of the Republic of Texas hereby recognizes her Independence and Sovereignty and engages to employ her good offices with the Republic of Mexico to procure her concurrence in the benign and pacific objects of this Convention."

[94] Laws 1843, Rep. of Texas, 7th Cong. x; 2 Gammel's Laws of Texas 889.

other major nations of the world had the retroactive effect of validating, along with other laws of the Republic, the boundary act setting the Gulfward boundary of the Republic "three leagues from land." This general principle was recognized and applied in *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302-303 (1918), wherein it was said:

> "It is also the result of the interpretation by this court of the principles of international law that when a government which originates in revolution or revolt is recognized by the political department of our government as the *de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence."

This principle was recognized in *Ricaud v. American Metal Company*, 246 U.S. 304, 308-309 (1918), the Court saying:

> ". . . the revolution inaugurated by General Carranza against General Huerta proved successful, and the government established by him has been recognized by the political department of our government as the de facto and later as the de jure government of Mexico, which decision binds the judges as well as all other officers and citizens of the government. [Citations.] This recognition is retroactive in effect and validates all the actions of the Carranza government from the commencement of its existence. [Citations.] . . .
>
> "It is settled. . . that the courts of one independent government will not sit in judgment

follows p. 4

# T E X A S

Austin

Houston

Caplen Field

High Island Field

Oilpool (1543-1902)

Sabine River

Ft. San Jacinto

Bolivar Jetty

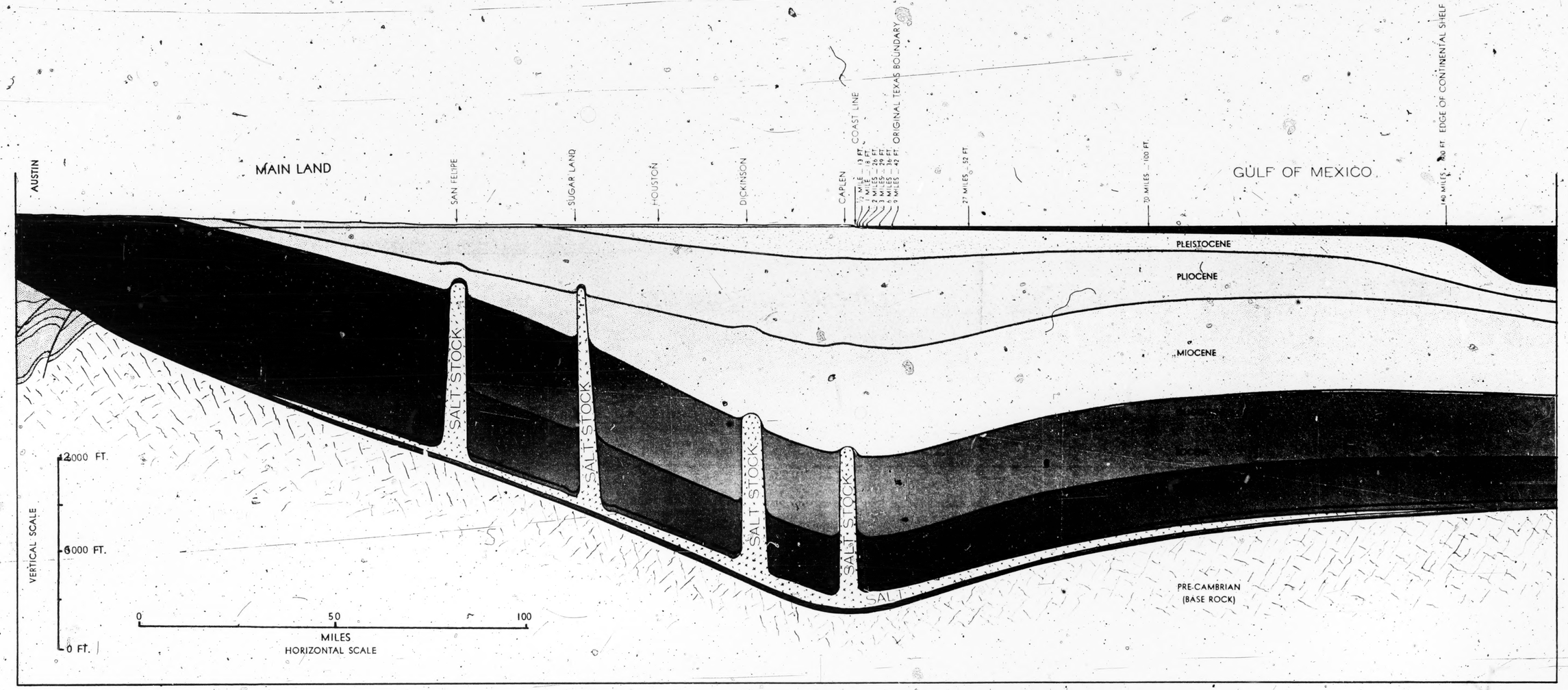
Galveston Jetty

Corpus Christi

Edge of Continental Shelf

Rio Grande

Brownsville



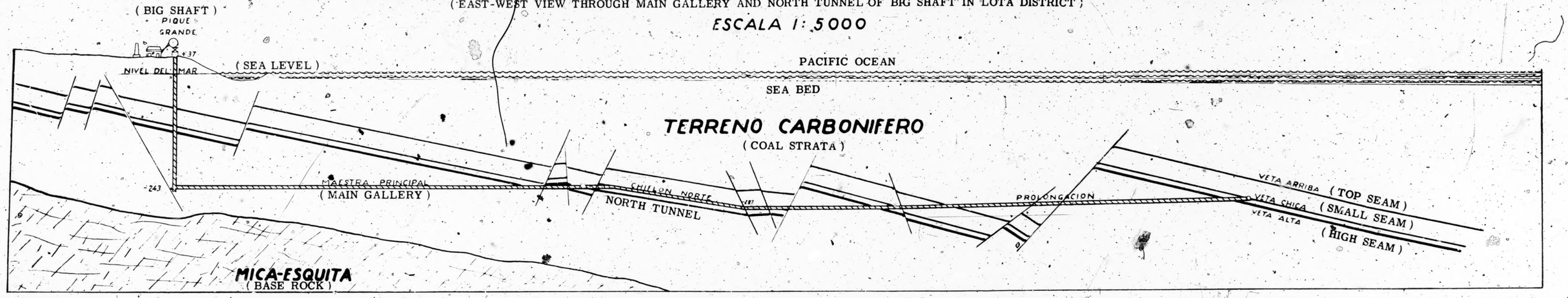

PROFILE SECTION OF TEXAS MAINLAND AND CONTINENTAL SHELF

(Follows Page 4).

# CORTE ESTE-OESTE POR MAESTRA PRINCIPAL Y CHIFLON NORTE DEL PIQUE GRANDE DEL ESTABLECIMIENTO DE LOTA

( EAST-WEST VIEW THROUGH MAIN GALLERY AND NORTH TUNNEL OF BIG SHAFT IN LOTA DISTRICT )

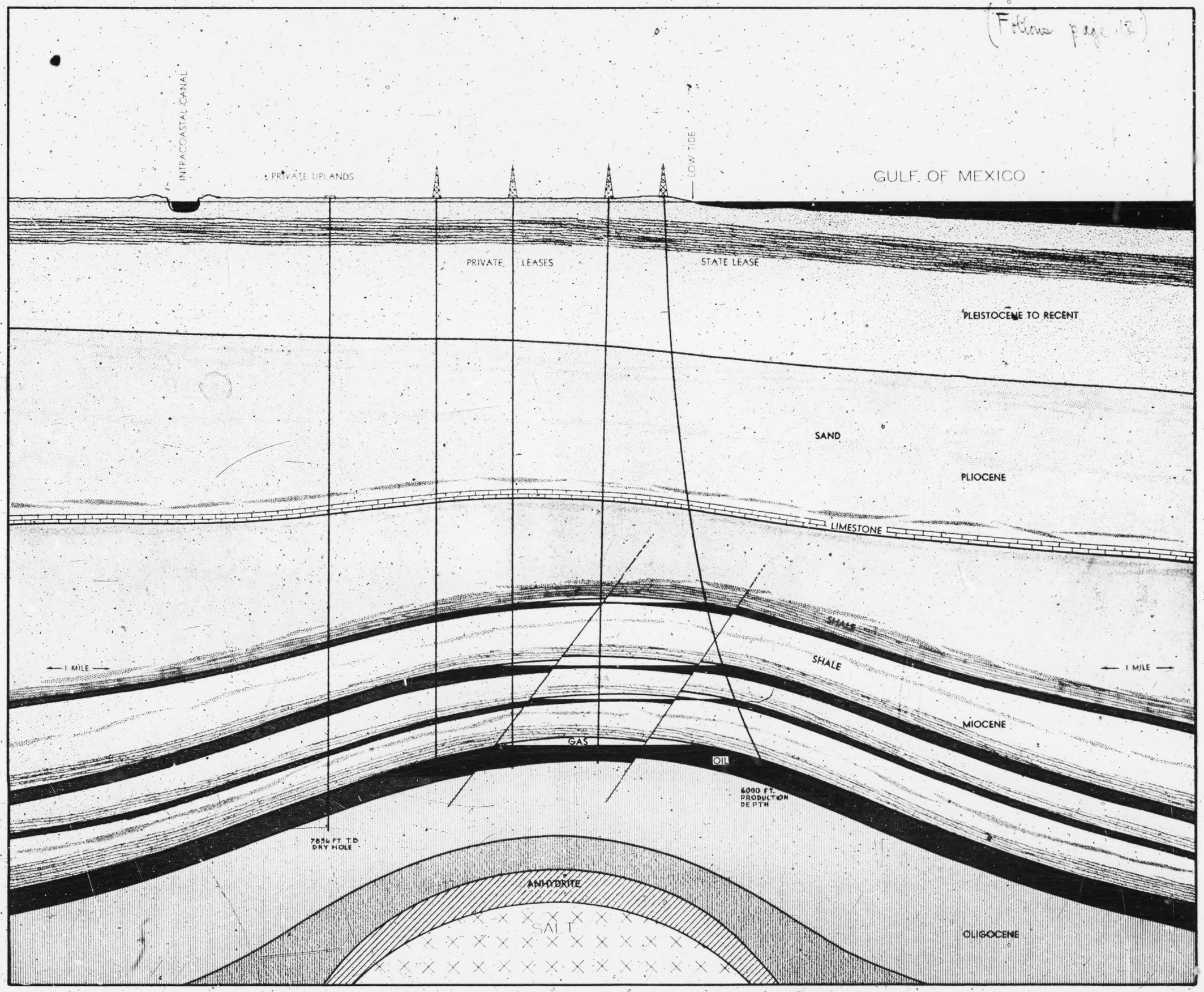
ESCALA 1:5000




Submarine coal mine running four miles from shore underneath the Pacific Ocean, Lota. Chile.

*Operations began 1852*

(Follows page 12)




DIAGRAMMATIC CROSS SECTION OF CAPLEN FIELD, TEXAS

SHOWING MINERAL PRODUCTION UNDER BOTH UPLANDS AND GULF

A-12

RED RIVER

FANNIN

MILAM

RED RIVER

CUMANCHE

SHELBY

NACOGDOCHES

HOUSTON

JASPER

MONTGOMERY

WASHINGTON

MILAM

LIBERTY

JEFFERSON

LAVACA

SAN FELIPE

COLORADO

FORT BEND

GONZALES

BRAZORIA

MATAGORDA

SAN ANTONIO

GOLIAD

REFUGIO

SAN PATRICIO

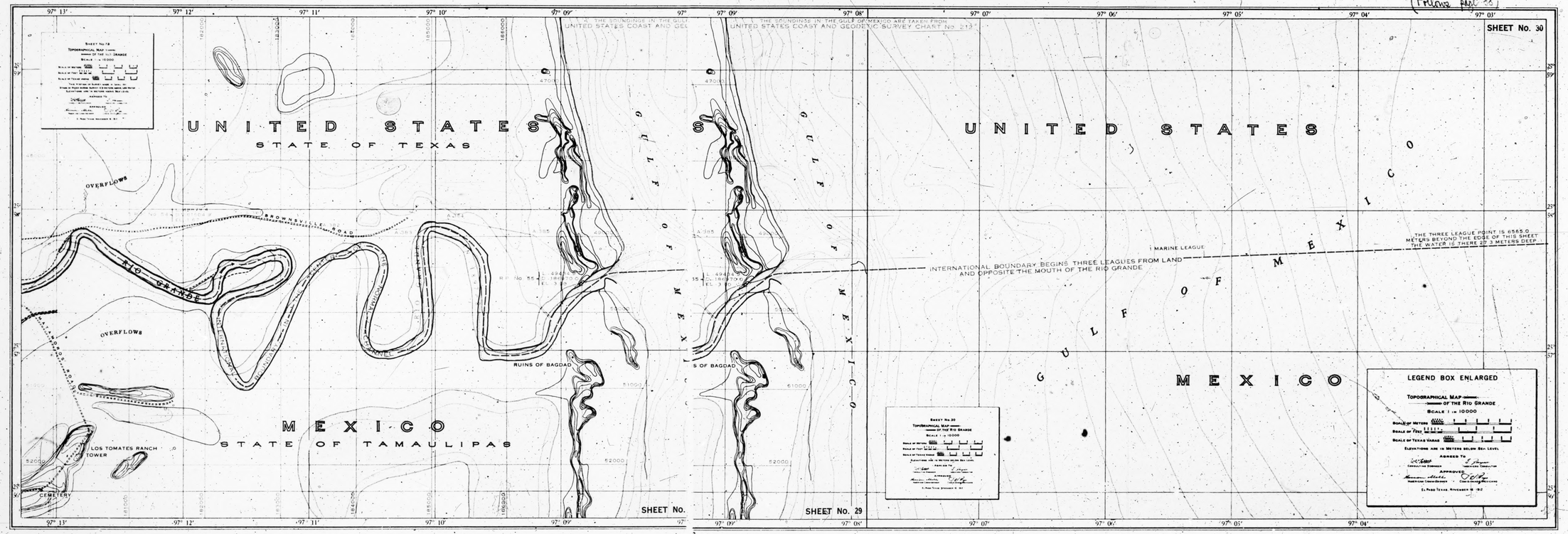
Laredo

Rio Bravo

# Map
*OF THE*
# REPUBLIC
*of*
# TEXAS
*Shewing its division into Counties and Latest Improvements to*
*1837*

Compiled & Published by Sherman & Stone

(Follows Page 60)




REDUCED SCALE REPRODUCTICED SCALE REPRODUCTION OF MAP SHEETS 29 AND 30 OF

"Department of State—PROCEEDING nent of State—PROCEEDINGS OF THE INTERNATIONAL BOUNDARY COMMISSION, UNITED STATES AN SION, UNITED STATES AND MEXICO—Joint Report of the Consulting Engineers on Field Operations of 19 s on Field Operations of 1910-1911. American Section" (Department of State, 1913). 1913).

> on the validity of the acts of another, done within its own territory. [Citations.] This last rule . . . requires that when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned, but must be accepted by our courts as a rule for their decision. . . ."[95]

Plaintiff argues that the recognition by the Republic of Texas, in its Convention of 1838 with the United States, of the binding effect of the treaties of 1819 and 1829 created a conflict between the boundaries set forth in those treaties and the three-league boundary declared by the Republic in 1836.[96] When all the facts concerning this Convention are examined, it will be apparent that no such "conflict" exists.

It is clear from the proceedings of the Convention that it concerned only *a portion* of the mainland boundary and only *that portion* of the boundary between the United States and Texas was to be marked. In the second *whereas* clause in the Preamble, it was declared to be proper and expedient

> "that a *portion* of the same [the boundary] should be run and marked without unnecessary delay."

---

[95] Other cases recognizing this principle are: *United States v. Belmont*, 301 U. S. 324 (1937); *Underhill v. Hernandez*, 168 U. S. 250 (1897); *Williams v. Bruffy*, 96 U. S. 176 (1878); *United States v. Pink*, 315 U. S. 203 (1942); *Chemical, S. A. v. Ferrotar Corporation*, 51 F. Supp. 756 (S.D.N.Y. 1943); *Aksionairnoye Obschestvo v. James Sagor & Co.*, 3 K.B. 532, 11 B.R.C. 666 (1921).

[96] Brief for the United States, pp. 49-52.

Article I of the Treaty says:

> "that *portion* of the said boundary which extends from the mouth of the Sabine. . ."

Article II says that each party

> "shall continue to exercise jurisdiction in all territory over which its jurisdiction has hitherto been exercised,"

and

> "the remaining portion of the said boundary line shall be run and marked hereafter."

Until such time each party was to

> "exercise without the interference of the other within the territory of which the boundary shall not have been so marked and run, jurisdiction to the same extent to which it has heretofore usually exercised."[97]

This, with full knowledge of Texas' coastal three-league boundary, was another act of recognition of the "territory of which the boundary shall not have been so marked and run." The fact that the two nations ran only that portion of their common boundary from the mouth of the Sabine north should not be taken as a disclaimer on the part of either nation to its marginal belt boundary in the Gulf south of the mouth of the Sabine.

That only a portion of the boundary between the United States and the Republic of Texas was in-

[97] 8 Stat. 511.

tended to be, and was, marked by the boundary commission is made clear by the following statement from 4 *Miller, Treaties and Other International Acts of the United States of America* (G.P.O. 1934) 141:

> "The boundary between the United States and the Republic of Texas was only a part of the line first fixed by the treaty of 1819 with Spain and later adopted as the boundary between the United States and Mexico by the Treaty of Limits of 1828; and it is to be particularly observed, moreover, that this convention provided for the immediate demarcation of only a portion of the boundary between the United States and the Republic of Texas, namely, that 'which extends from the mouth of the Sabine, where that river enters the Gulph of Mexico to the Red River,' a distance of less than 300 miles."[98]

That the United States and the Republic of Texas were concerned only with that portion of the boundary described for demarcation in the convention and that there was no intention to disclaim or abandon any other portion of the boundary between them is clearly shown by the following instructions to the Texas boundary commissioner, Memucan Hunt, by the Secretary of State of Texas, R. A. Irion, on March 21, 1838:

> "The present boundaries of Texas as fixed by an act of Congress are as follows, viz,—begin-

[98] That the boundary traced in this Convention was chiefly a land boundary is not unusual. Instances are rare in which two adjacent littoral nations have specifically surveyed and marked the water boundaries between their adjacent marginal seas. The surveys of the United States-Mexican boundary (see chart, pp. 88-89) thus take on added significance because they are exceptional.

ning at the mouth of the Sabine River and running west in the Gulph of Mexico three leagues from land to the mouth of the Rio Grande; thence up the principal branch of said river to its source, then north to the forty-second degree of north latitude; thence along the boundary line as defined in the treaty between the United States and Spain to the beginning."[99]

The United States, in treating with the representatives of the Republic of Texas in 1838, at no time suggested any conflict between the three-league sea boundary of the Republic and the treaties of 1819 and 1828, nor did it in any way question this boundary.

From 1836 to 1845, the Republic of Texas exercised its jurisdiction and control over that portion of the Gulf of Mexico within its boundaries three leagues from shore. An example of this was the passage of acts establishing courts of admiralty and providing for a coastal patrol for protection and collection of revenues to be derived from the area.

During this period, the Navy of Texas patrolled and defended the waters of the Gulf of Mexico within the three-league boundary. In 1836, the Texas Navy captured two American vessels and one British vessel engaged in carrying of contraband and cargo. By 1840, the Texas Navy had gained command of the whole Gulf,[100] and retained this control until its

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[99] I Garrison 319.

[100] Richard Parkenham, British minister to Mexico, in a letter to Lord Palmerston, British Secretary of State for Foreign Affairs, said: "There is actually a Texian squadron cruising on the coast, which may at any moment commence offensive operations, and the Mexican Government possesses

annexation to the United States. Other evidence can and will be offered to show that there is no foundation in fact for plaintiff's assertion that "the Republic did not have control over the marginal sea." (Plaintiff's brief, p. 54.)

That the boundaries declared by the Republic of Texas in 1836 were the boundaries of the Republic at the time of annexation and were again recognized is shown by many statements made during the negotiations and after annexation had been accomplished. In a speech by Senator Benton of Missouri, May 16, 18, and 20, 1844, during the negotiations on the unratified treaty, he said:

> "The Republic of Texas acts by its name, and passes itself to us in the whole extent of all the limits and boundaries which it asserts to be its own. . . .
>
> ". . .
>
> ". . . The boundary is fixed, as much so as the most elaborate specification could make it. A law of the Texian Congress fixes the boundaries. It defines the boundaries of the Republic of Texas. . . . the fact is, the whole passes, with the precise boundaries named in the law. . . ."[1]

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not a vessel of the smallest description, not even a boat, to oppose them." Adams, *British Interests and Activities in Texas*, 1838-1846 (Baltimore, 1910) 47.

"The squadron of Texas dominates our gulf coast from the boundary of the U. S. to Cape Catoche in Yucatan" *Diario del Gobierno* (Mexico City) for October 4, 1840.

"Texas has now a Navy that commands the whole Gulf, and Mexico dares not set a single armed vessel afloat beyond the limits of her own harbor." Moore, *Map and Description of Texas* (New York, 1840) 40.

[1] Appendix to the Cong. Globe, 28th Cong., 1st Sess. 475.

On June 24, 1844, Mr. Breese of Illinois delivered a speech in the United States Senate in which he said that

> ". . . we have acknowledged the limits as defined in the act of the Texian Congress of 1836. . . . And why do I say so? Because we did, in 1837, with a full knowledge of these declared boundaries, acknowledge the independence of Texas as a state, with that act of her Congress then, and as now, in full force. . . ."[2]

Mr. Bowlin, of Missouri, in a speech before the House on January 15, 1845, said that if Texas "is a free, sovereign, and an independent power, no one can question her authority over and within the limits of her domains."[3]

In a speech in the House, on January 24, 1845, Mr. Haralson, of Georgia, made the following statement:

> "The Texian act of Congress, approved December 19, 1836, I have little doubt, defines correctly the boundary of that Republic."[4]

All of the diplomatic representatives of the Republic of Texas were instructed that the boundaries of the Republic were those declared in the act of December 19, 1836, and that in the negotiations of treaties with other countries these boundaries were to be maintained and recognized. We have letters and diaries which will show this to be true.

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[2] *Id.* at 540.
[3] Appendix to Cong. Globe, 28th Cong., 2d Sess. 94.
[4] *Id.* at 195.

Above all things, it was understood during the proceedings leading up to annexation that the boundaries asserted by Texas, and its consequent ownership of the unsold lands and minerals therein, were to be recognized and defended by the United States. There is a vast amount of evidence in the form of diplomatic correspondence, personal letters, diaries, and newspaper accounts which will substantiate this. An example is a letter from President Polk, dated June 15, 1845, to Andrew Donelson, U. S. chargé d'affaires, who was negotiating the agreement. In reply to Donelson's report that there was insistence on the defense of Texas' original boundaries, President Polk said:

> "Of course, I would maintain the Texian title to the extent which she claims it to be. . . ."

This and like evidence will demonstrate that plaintiff makes an incorrect factual conclusion when it contends that the United States did not recognize the 1836 boundaries as "rightful" and "proper." (Plaintiff's brief, pp. 15, 52.)

The joint resolution for annexing Texas was passed by the Congress of the United States on March 1, 1845, providing

> "That Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new state, to be called the State of Texas.
>
> ". . .
>
> ". . . and [said State] shall also retain all the vacant and unappropriated lands lying *within its limits.* . . ."

Thereupon a joint resolution by the Congress of Texas of June 23, 1845, consented to the incorporation, using the words "people and territory of the Republic of Texas." The annexation was completed after the Constitution for the new State was submitted and approved as "in conformity to the provisions of said joint resolution" of annexation by the United States Congress on December 29, 1845. (Appendix, pp. 58-64.) This Constitution adopted by Texas "in accordance with the provisions of the joint resolution for annexing Texas to the United States" and so approved by the Congress of the United States, contained the following provisions:

> "The rights of property and of action which have been acquired under the Constitution and laws of the Republic of Texas, shall not be divested; . . . but the same shall remain precisely in the situation which they were before the adoption of this Constitution." (Article VII, Section 20.)[5]
>
> "All laws and parts of laws now in force in the Republic of Texas, which are not repugnant to the Constitution of the United States, the joint resolutions for annexing Texas to the United States, or to the provisions of this Constitution, shall continue and remain in force as the laws of this State, until they expire by their own limitation, or shall be altered or repealed by the Legislature thereof." (Article XIII, Section 2.)[6]

The latter provision continued in effect the boundary act of December 19, 1836.

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[5] 2 Gammel's Laws of Texas 1293-94.
[6] *Id.* at 1299.

This principle as a matter of law was recognized in *New Mexico v. Texas*, 276 U.S. 557 (on reh'g 1928), where this Court said:

> "New Mexico, when admitted as a State in 1912, explicitly declared in its Constitution that its boundary ran 'along said thirty-second parallel to the Rio Grande. . . .' This was confirmed by the United States by admitting New Mexico as a State with the line thus described as its boundary. . . ."[7]

That this was the intention of the parties is confirmed also by the subsequent construction of the annexation agreement by both parties.

*Subsequent Construction*

After Texas had officially become a member of the United States, the legislature promptly reaffirmed, on April 29, 1846, the State's "exclusive right to the jurisdiction over the soil included in the limits of the late Republic of Texas. . . ."[8]

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[7] *Accord: New Mexico v. Colorado*, 267 U.S. 30, 41 (1925); and *Pope v. Blanton*, 10 F. Supp. 18 (D.C. Fla. 1935), mod. 299 U.S. 521 (1935).

[8] The entire Act read as follows:

"JOINT RESOLUTION Declaring the exclusive right of the State of Texas to the jurisdiction over the soil included within the limits thereof.

"Section 1. Be it resolved by the Legislature of the State of Texas, That the exclusive right to the jurisdiction over the soil included in the limits . the late Republic of Texas was acquired by the valor of the people thereof, and was by them vested in the government of the said Republic, that such exclusive right is now vested in and belongs to the State, excepting such jurisdiction as is vested in the United States, by the consti-

During the war with Mexico of 1846-48, the government of the United States repeatedly recognized Texas' boundary as established by its Congress in 1836. In fact, the war came about because Mexico disputed Texas' western boundary on the Rio Grande, which together with the three-league line from its mouth into the Gulf, also formed a portion of Texas' southwestern boundary. President Polk had promised Texas prior to annexation that he "would maintain the Texian title to the extent which she claims it to be, and not permit an invading enemy to occupy a foot of the soil East of the Rio Grande. . . ."[9]

In a speech on the boundary of Texas Sam Houston, Texas liberator, president, and then United States Senator, said:

"There is no question what is the boundary; for it was defined, asserted and maintained before the annexation was made; and it has never

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tution of the United States, and by the joint resolution of annexation, subject to such regulations and control as the government thereof may deem expedient to adopt; that we recognize no title in the Indian tribes, resident within the limits of the State to any portion of the soil thereof, and that we recognize no right in the government of the United States to make any treaty of limits with the said Indian tribes, without the consent of the government of this State.

"Sec. 2. Be it further resolved, That his excellency the Governor, be requested to communicate this resolution to the government of the United States, and to our senators and representatives in congress.

"Approved, 29th April, A. D. 1846." Acts 1846, 1st Leg., 155; 2 Gammel's Laws of Texas 1461.

[9] The Papers of President James K. Polk, vol. 72, p. 6767, Library of Congress.

been questioned, except by those who have raised the question from party motives and faction."[10]

In connection with the negotiations for the Treaty of Guadalupe Hidalgo of 1848, ending the war between the United States and Mexico, Article 4 of the projet of the treaty, written by Secretary of State Buchanan and sent to Nicholas P. Trist, the United States negotiator, on April 15, 1847, provided that

> "The boundary line between the two Republics shall commence in the Gulf of Mexico *three leagues* from land opposite the mouth of the Rio Grande, from then up the middle of that river to the point where it strikes the southern line of New Mexico. . . ."[11]

It is significant that at this time a joint resolution was passed by the legislature of the State of Texas providing

> "That our Senators be further instructed to oppose any treaty with Mexico which may provide for lessening the boundaries of Texas, as established by an act, to define the boundaries of the Republic of Texas, approved December 19, 1836." Acts, 2nd Leg., 1848, Vol. 2, Ch. 151, p. 218; 3 *Gammel's Laws of Texas* 218.

In a counter-draft of the treaty proposed by the Mexican commissioners, who contended for the Nueces instead of the Rio Grande, a copy of which

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[10] Democratic Telegraph and Texas Register, March 2, 1848; 5 *The Writings of Sam Houston* (Austin, 1941) 29.

[11] Dept. State, 16 *Instructions, Mexico*, 46, 62.

was inclosed in a letter to Buchanan from Trist, September 27, 1847, the fourth article read:

> "The dividing line between the two Republics shall commence in the Gulf of Mexico *three leagues* from land opposite the south mouth of the Bay of Corpus Christi, will run straight within the said Bay as far as the mouth of the Nueces River; will then fall into the middle of the said River along its whole course up to its source. . . ."[12]

Trist prevailed and the negotiations were terminated on February 2, 1848, and the treaty signed by Trist and the Mexican commissioner. Texas' 1836 boundary was followed. Article 5 of this treaty, which relates to the boundary line, reads in part as follows:

> "The boundary line between the two Republics shall commence in the Gulf of Mexico, *three leagues* from land, opposite the mouth of the Rio Grande. . . ."[13]

In all the negotiations and in the draft of the treaty signed, the three-league boundary theretofore maintained by Texas for ten years was never questioned by either party, even though other portions of the boundary between the United States and Mexico were disputed. Although the original instructions to Trist concerning the boundary were subsequently modified, that portion dealing with the three leagues in the Gulf of Mexico remained unchanged. The importance to this case is that neither Mexico nor the United States had previously claimed

[12] Dept. State, *Dispatches, Mexico*, XIV.
[13] 9 Stat. 922-23.

marginal sea boundaries in excess of two leagues. In the negotiations the Mexicans were concerned with establishing the line at the Nueces rather than the Rio Grande. Clearly, the three-league boundary then agreed upon was the Texas boundary which President Polk and Congress had recognized and agreed to defend.

In the debates in the Senate on the ratification of this treaty, no question was raised as to the validity of that portion of the boundary commencing "in the Gulf of Mexico, three leagues from land. . . ." The treaty was ratified by the Senate on March 10, 1848.[14]

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[14] The three-league boundary set forth in the Treaty of Guadalupe Hidalgo was the subject of the following letter from Mr. Crampton, British chargé d'affaires at Washington, to Mr. Buchanan, Secretary of State, on April 30, 1848:

> "I have been instructed by Her Majesty's Government to call the attention of the Government of the United States to that part of the 5th Article of the Treaty of Peace between the United States and Mexico, signed on the 2d of February, by which the Boundary line between the two Republics is defined as commencing in the 'Gulph of Mexico, three leagues from Land opposite the mouth of the Rio Grande.' . . .
>
> "I have been directed to state to the United States' Government that, in order to prevent future misunderstanding, Her Majesty's Government think it right to declare that they cannot acquiesce in the extent of Maritime Jurisdiction assumed by the United [States] and by Mexico in the Article in question."

In replying to this letter on August 19, 1848, Mr. Buchanan said:

> "In answer I have to state, that the stipulation in the treaty can only affect the rights of Mexico and the United States. If for their mutual convenience it has been deemed proper to enter into such an arrangement, third parties can have no just cause of complaint." I Moore, *Digest of International Law* (G.P.O. 1906) 730.

The only other major boundary dispute arose between the United States and Texas over the northwestern limits of the State after New Mexico had been ceded by Mexico to the United States. Texas' original boundary act of 1836 encompassed much of the present State of New Mexico and parts of the present States of Oklahoma, Colorado, and Wyoming.

After several months of debate on this question in Congress, Senator Pearce introduced his compromise bill, whereby, in consideration of the reduction of its western and northern boundaries from those previously claimed, Texas was to receive ten million dollars. The debates on this bill clearly show that the members of Congress were well acquainted with the provisions of the 1836 boundary act and all of its implications. Senator Foote, of Mississippi, speaking in the Senate on January 16, 1850, said that

> ". . . title to all the territory claimed for her by the act of 1836, entitled 'An act for defining the boundaries of the republic of Texas,' is one which no ingenuity can undermine and no sophistry elude. Indeed, I suppose that the true limits of Texas will never again be disputed in the Congress of the United States. . . ."[15]

On July 30, 1850, Senator Sam Houston, of Texas, stated to the Senate:

> "We have had the same boundary from first to last. We commenced our existence as a nation with a declared boundary; we maintained it in the revolution for eight years, and contended for that boundary when the United

[15] Cong. Globe, 31st Cong., 1st Sess. 166.

States were substituted in place of Texas, and the contest was going on for the attainment of that boundary. None other was ever thought of. . . ."[16]

On September 9, 1850, Mr. Pearce's compromise measure as amended in the House was passed in the Senate.[17] It was signed by President Fillmore on the same day. On November 25, 1850, this compromise measure was approved by the legislature of the State of Texas.[18]

A further acknowledgment by the United States of Texas' three-league boundary in the Gulf is found in the Gadsden Treaty, concluded between the United States and Mexico December 30, 1853.[19] Article 1 of this treaty provides that

". . . the limits between the Two Republics shall be as follows: Beginning in the Gulf of Mexico, *three leagues* from land, opposite the mouth of the Rio Grande, as provided in the fifth article of the treaty of Guadalupe Hidalgo. . . ."

and for the demarcation of this boundary by a joint commission of both countries. The official report of the marking of this boundary, prepared for the Department of Interior, states that

"Lt. Wilkinson, in command of the brig *Morris*, repaired at the appointed time to the mouth

[16] Appendix to Cong. Globe, 31st Cong., 1st Sess. 1447.
[17] Cong. Globe, 31st Cong., 1st Sess. 1784.
[18] Acts 1850, 3rd Leg., Vol. 3, Part 4, Ch. 2, p. 3; 3 Gammel's Laws of Texas 832.
[19] Cong. Globe, 33rd Cong., 1st Sess. 1568.

Turn to Card No. 1803 for Chart Appearing at This Spot.

of the river and made soundings . . . to trace the boundary as the treaty required, '*three leagues out to sea.*' "[20]

This three-league line was actually surveyed again and agreed upon as the international boundary between the United States and Mexico in 1911. See reproduction of charts from the Department of State opposite this page.

That the three-league boundary of the Republic of Texas was retained by the State of Texas upon annexation is shown by the following statement of Riesenfeld:

"With respect to Texas certain historical factors are involved. The sea boundary of the Republic of Texas was by statute fixed at three leagues from land along the Gulf of Mexico. The territory 'properly included within, and rightfully belonging to the Republic of Texas,' was admitted into the Union and became the new state of Texas by two joint resolutions of the federal Congress coupled with one joint resolution by the Congress of the Republic of Texas. The admission was expressly subject, however, to the power of adjustment by Congress 'of all questions of boundary that may arise with other governments.' Such an adjustment was contained in the above-mentioned treaty with Mexico of 1848, which provided for a boundary commencing at sea at a distance of three leagues from land. Even though Secretary Buchanan declared that this stipulation had effect only *inter partes*, it would seem to follow from the three joint resolutions mentioned

[20] 1 Emory, Report on the United States and Mexican Boundary Survey (Washington, 1857) 58.

above that the gulf boundary of Texas runs at a distance of three leagues from the Gulf coast."[21]

The three-league boundary of the Republic and State of Texas is also recognized by Geological Survey Bulletin 817 of the United States Department of Interior, where the following is found:

> "The area which Texas brought into the Union was limited as follows, as defined by the Republic of Texas, December 19, 1836 (see fig. 14):
>
> "'Beginning at the mouth of the Sabine River and running west along the Gulf of Mexico three leagues from land to the mouth of the Rio Grande, thence up the principal stream of said river to its source, thence due north to the forty-second degree of north latitude, thence along the boundary line as defined in the treaty between Spain and the United States to the beginning.'"[22]

This fact has been recognized also by decisions of both United States and Texas courts.

In *United States v. Texas*, 162 U.S. 1 (1896), the opinion of this Court makes repeated reference to the act of the Texas Congress of December 19, 1836, quoting in full the boundaries declared by this act. The basis of this Court's solution of the Red River

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[21] Riesenfeld, *Protection of Coastal Fisheries Under International Law* (Washington, 1942) 258-59.

[22] Douglas, *Boundaries, Areas, Geographical Centers, and Altitudes of the United States and the Several States*, U. S. Dept. of the Interior, Geological Survey Bulletin 817 (2nd ed. 1930) 36-37; House Document No. 113, 71st Cong., 1st Sess.

controversy in that case was that the boundaries of Texas were fixed before becoming a member of the Union.

One of the most comprehensive cases on the ownership by the State of Texas of the lands within the boundaries of the Republic of Texas is *Amaya v. Stanolind Oil & Gas Co.*, 62 F. Supp. 181 (1945), *aff'd* 158 F. (2d) 554 (C.C.A. 5th, 1946), *cert. den.* 331 U.S. 808 (1947), *reh'g den.* 331 U.S. 867 (1947), which involved the title to certain land between the Nueces River and the Rio Grande. After setting out the Texas boundary act of 1836, Judge Hannay said:

> "This act of Texas has never been repealed, and at the time that Texas was finally admitted to the United States, to-wit: December 29, 1845, a new constitution was adopted which expressly provided for the continuation of such prior enactment in full force.
>
> "
>
> ". . . During the negotiations of 1844, and in compliance with the call of the Senate, pending the attempt to secure the admission of Texas into the Union, President Tyler sent to the United States a map of the country proposed to be secured as Texas, and upon that map is shown 'Texas and the Countries Adjacent. Compiled in the Bureau of the Corps of Topographical Engineers. From the Best Authorities. For the State Department. Under the Direction of Colonel J. J. Abert, Chief of the Corps, by W. H. Emory, 1st Lieut. T. E. War Department, 1844.' A photostatic copy of this map is hereto attached, marked Exhibit A, and made a part hereof. It accepts as correct the boundaries as defined by an Act of the Texas Congress, approved Decem-

ber 19, 1836, a copy of which Act has been heretofore set out. . . . It was on this map that the negotiations were had which resulted in the annexation of Texas. . . ."[23]

". . .

". . . The United States recognized that in view of the annexation agreement, Texas was the superior sovereign, so far as land and land titles in Texas were concerned.

". . .

"Prior to annexation, Texas as a republic had complete control of all land within its borders.

". . .

". . . In view of the repeated statements of the Supreme Court of the United States, both before and after annexation and the Treaty of Guadalupe Hidalgo, it is most unreasonable to argue that the Treaty of Guadalupe Hidalgo in any way takes away any of the sovereign rights of Texas respecting land." (62 F. Supp. 181, *supra*, at pp. 194-200.)

*City of Galveston v. Menard*, 23 Tex. 349 (1869), involved the title to certain flats in the City of Galveston, which were usually covered with water. Holding that the grant by the legislature to defendant included these flats, the Texas Supreme Court said:

"The republic of Texas had the power, through its legislative department, to grant that part of Galveston bay, which lies south of the channel, usually covered with salt water, which constitute what is called the 'flats'; and thereby vest an exclusive right in Menard to the soil thereof, and to the full ownership of the same, just as if it had been dry land.

[23] The map appears in 62 F. Supp. 181 at page 185.

> "This power results, as a necessary consequence of the absolute sovereignty of the republic, over the territory included in its limits. The southern boundary of that territory was defined by an act of the Texas congress, to extend from 'the mouth of the Sabine river, and running west along the gulf of Mexico, *three leagues* from land, to the mouth of the Rio Grande,' etc. Hart. Dig. arts 1631 and 1634." (pp. 390-391.)

In *Kennedy Pasture Co. v. State*, 111 Tex. 200, 231 S. W. 683 (1921), *cert. den.* 258 U.S. 617, certain land in Willacy County was in dispute. After quoting the joint resolution of the Texas legislature enacted April 29, 1846,[24] the Supreme Court of Texas said that this was

> ". . . a reaffirmation of the sovereignty of Texas over all territory within the borders of the Republic as defined by the resolution of December 19, 1836, and proclaimed both its rightful and actual jurisdiction over this territory." (p. 690.)

*City of Galveston v. Mann*, 135 Tex. 319, 143 S. W. (2d) 1028 (1940), was a mandamus proceeding by the city to compel the Attorney General to approve bonds of the City of Galveston for the construction of a pier extending from the shore 1194 feet into the bed and waters of the Gulf. The question was whether the city had the right to make such construction without a deed or other authority from the State. In denying the mandamus, the Texas

[24] *Supra*, p. 82, note 8.

Supreme Court reviewed "the legal history of the State's ownership of the waters and submerged lands of the Gulf of Mexico," saying:

> "On December 19, 1836, it was enacted by the Senate and the House of Representatives of the Republic of Texas that from and after the passage of that Act, the civil and political jurisdiction of the Republic was declared to extend to the following boundaries, to wit: [the court here set out the description of the boundaries contained in the Act and heretofore quoted. See *supra*, p. 58.]
>
> "
>
> . . .
>
> "This Court in many important decisions has zealously guarded and enforced the rights of this State to the public lands of the State as provided and guaranteed to it in the foregoing resolutions of the Republic of Texas, the resolutions of the United States Congress appertaining to the annexation of the Republic of Texas, and in the Acts passed by the legislature of the State of Texas." (pp. 1032-1033.)[25]

It is settled that the right of a state, upon its admission into the Union, to rely upon its established boundary lines cannot "be impaired by any subsequent action on the part of the United States." *New Mexico v. Colorado*, 267 U.S. 30, 41 (1925). See also *United States v. Utah*, 283 U. S. 64, 88-89 (1931).

*Louisiana v. Mississippi*, 202 U.S. 1 (1906), involved a boundary dispute between these two states.

[25] See also *State v. Jadwin*, 85 S. W. 490 (Tex. Civ. App. 1904, error ref.).

In speaking of a possible repugnancy as to boundaries between the acts admitting Louisiana and Mississippi, the Court said that

> "If it were true that this repugnancy between the two acts existed, it is enough to say that Congress, after the admission of Louisiana, could not take away any portion of that state and give it to Mississippi. The rule, *Qui prior est tempore, portior est jure*, applied, and § 3 of Art. 4 of the Constitution does not permit the claims of any particular state to be prejudiced by the exercise of the power of Congress therein conferred." (pp. 40-41.)

From what has been said, the State believes it can clearly show upon a full development of the evidence that Texas' three-league Gulfward boundary was reasonable and was accepted and recognized by the United States and other nations.

The nature of defendant's evidence as to the legal regime which was applied to the seabed and subsoil within that boundary must now be outlined.

(2) *Under International Law, by Including This Marginal Belt Within its Boundaries, the Republic of Texas Became the Owner of Its Seabed and Subsoil vis-a-vis Other Nations.*

In approaching this question at the outset, it is important to remember that our primary inquiry is whether the defendant's evidence will show that the Republic of Texas as an independent nation was the owner of the seabed and subsoil within its gulfward boundaries under international law as it had developed up to and including the period 1836-1845. Plaintiff's contrary interpretation of the status of

international law (regarded as an expression of the customs and usages of nations) has made this inquiry one of fact as well as of law. Its determination will require an examination of the practice of nations in their customs and usages *inter se*, which practice in turn evidences the then existing state of international law. Defendant plans to present to the Court the testimony of some of the world's leading experts on this issue if plaintiff persists in its interpretation. In the meantime, defendant presents herein a collection of statements of all international law writers whose works are available and who treated this question of ownership. See Appendix, p. 18.

Plaintiff admits (brief, p. 49) that "As for territorial jurisdiction, there is no doubt that the Republic [of Texas] openly claimed the marginal sea within its boundaries. . ." and the recognition and maintenance thereof has been shown under the boundary discussion above.

The ownership by the sovereign of all land (not previously granted) within its boundaries is an elementary principle of both international and domestic law. The common law rule is stated in Bacon's Abridgement:[26]

> "The king by our law is universal occupant, and all property is presumed to have been originally in the crown. . . ."

That the principle applies alike to submerged lands and uplands was expressed by Hall[27] as follows:

[26] Edition by Bouvier (Philadelphia, 1869), vol. 8, p. 13.

[27] *Essay on the Rights of the Crown in the Sea-shore of the Realm* (first published in 1830), 3d ed. reprinted in Moore, Stuart A., *History and Law of the Foreshore and Sea Shore* (London, 1888) 667.

> "The title of the King of England to the land or soil *aqua maris cooperata*, is similar to his ancient title to all the *terra firma* in his dominions, as the first and original proprietor and lord paramount. It is a fundamental principle of our laws of property in land, *that all the lands in the realm belonged originally to the King.* . . ."

The principle was applied to submerged lands in the English case of *Benest v. Pipon*[25] in which the Privy Council stated:

> "What never has an individual owner belongs to the Sovereign within whose territory it is situated. . . ."

This Court recognized that principle in the case of *Johnson v. McIntosh*, 8 Wheat. 543, 595 (1823), where it is said:

> "According to the theory of the British constitution, all vacant lands are vested in the crown, . . . this principle was as fully recognized in America as in the islands of Great Britain."

In *United States v. Bevans*, 3 Wheat. 336, 386-387 (1818), Chief Justice Marshall said:

> ". . . What then is the extent of jurisdiction which a state possesses? We answer, without hesitation, the jurisdiction of a state is coextensive with its territory; coextensive with its legislative power."

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[25] 1 Knapp 60, 12 Eng. Rep. 243 (Privy Council, 1829).

In *Rhode Island v. Massachusetts*, 12 Pet. 657 (1838), this Court said:

> "It follows, that when a place is within the boundary, it is a part of the territory of a state; *title, jurisdiction and sovereignty are inseparable incidents, and remain so, till the state makes some cession.* The plain language of this court in the *United States v. Bevans*, 3 Wheat. 386 et seq., saves the necessity of any reasoning on this subject . . . *Title, jurisdiction, sovereignty, are, therefore, dependent questions, necessarily settled, when boundary is ascertained, which, being the line of territory, is the line of power over it.* . . ."

It remains only to be shown that the lands and minerals within Texas' original boundaries were susceptible of ownership (subject, of course, to innocent passage and use of the waters) during the period of 1836-1845 under the existing rules of international law. Had the distinction between "open" or "high" seas and the shallower marginal belt of "territorial waters" been fixed at that time to the extent that a nation acquired ownership of the bed and subsoil of that part of the marginal belt brought within its boundaries?

Plaintiff made an excellent affirmative argument for us on this question in the *California* case. There plaintiff took the position that neither the territorial sea limit nor the ownership concept had become developed prior to 1776 and reasoned therefrom that the original States did not separately acquire such ownership. *But*, plaintiff argued, *soon after 1776 the concepts of territory and ownership began to be*

*accepted by the nations of the world.* Plaintiff went on to show that the concepts had become fully developed before July 7, 1846, or at least July 4, 1848, when it claimed to have obtained title to the California marginal sea from Mexico. In its brief in the *California* case, the United States said:

> "The conquest of California by the United States is regarded as having been completed on July 7, 1846. . . . It is undisputed that the United States acquired complete right in the submerged lands from Mexico. . . . It is the Government's position, on the other hand, that the rights in the marginal sea never did pass from the United States."[29]

In this case the Government now says:

> "And the 19th and 20th century materials collected in the Government's brief in the *California* case . . . indicate that the general international law acceptance of the concept came about in the *latter portion* of the period, the notion of a three-mile territorial belt, both in its territorial and property sense, being very immature, if not foetal, in 1845."[30]

It is difficult to see how the United States could have been said to have obtained proprietary rights in offshore submerged lands against California in 1846 or 1848 if property rights in the coastal belt were "very immature, if not foetel, in 1845."

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[29] Brief in Support of Motion for Judgment, *United States v. California*, No. 12, Original, Oct. Term, 1946, pp. 58-59.

[30] Brief in Support of Motion, p. 45.

Plaintiff's argument in the *California* case (as distinguished from that which it now makes) that by 1846 the concept of sovereign ownership of the seabed and subsoil of the maritime belt had become definitely fixed in international law is borne out by reference to the sources to which this Court has looked to determine that law. Such a reference will, by the same token, positively disprove its present argument. As to these sources the Court has said:

> "International law is a part of our law, it must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these to the works of jurists and commentators who by years of labor, research, and experience have made themselves particularly or peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be but for trustworthy evidence of what the law really is." *The Packet Habana*, 175 U.S. 677, 700 (1900).

All of the international law publicists who dealt with the subject and whose writings were published prior to 1845 recognized that the coastal nation under then existing international law and practice held both sovereignty (*imperium*) and ownership (*dominium*) in the seabed and subsoil of the marginal sea.

What they had to say is shown on the chart of opinions of jurists and publicists (Appendix, p. 18). Since plaintiff here claims that the notion of a territorial belt "both in its territorial and property sense [was] very immature, if not foetal, in 1845," those works of publicists which appeared between 1776 and 1845 are most pertinent to the issue thus posed by plaintiff. To these we now turn.

Giovanni Lampredi, Italian publicist, writing in 1776, said:

> "Therefore it cannot be doubted that these parts of the sea can be subjected to dominium and to imperium, for the sake both of utility and security."[31]

Ferdinando Galiani, Italian statesman, wrote in 1782:

> "Finally, it is well established that the edge of the open sea which washes the shore of the land belongs to and is regarded as incorporated with the territory, and forms a part of it."[32]

Georg Friedrich von Martens, German jurist and publicist whose work, translated into English by William Cobbett in 1802, was dedicated to President Washington and subscribed to by all members in Congress, declared:

> "In order to better understand the rights of nations in the seas and waters in general, it is essential to distinguish property from empire.

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[31] *Juris Publici Universalis Sive Juris Naturae et Gentium Theoremata* (2d Italian ed., Cacchi, Milan, 1828) 180.

[32] *Dei Doveri dei Principi Neutrali* (2d ed., Bologna 1942) 132.

The first implies the right to enjoy a thing exclusively, and even to dispose of it; the second, a right to demand obedience, respect, and honor, from those who make use of it."

". . . the seas surrounding the coast . . . are . . . entirely the property, and subject to the dominion of the master of the coast. . . ."[33]

Pierre Boucher, writing in 1803, said:

". . . The sea which washes the coast of a state is property, or a continuation of its territorial property."[34]

Joseph Rayneval, writing in the same year, said:

"The sea which washes the coast of a state is considered to be a part of it; . . . we might add that the bottom of the sea, along the coast, can be considered as having been a part of the continent, and that it is therefore considered as still forming part of it."[35]

Azuni, Italian jurisconsult, cited by this Court in *United States v. California*, said in 1806:

"The right of sovereignty along the seashore flows from the territorial domain."

"It follows from this fundamental principle, that the empire of the sea, according to the system established in the preceding chapter, is

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[33] *Précis du droit des gens moderne de l'Europe* 159-160, 168.

[34] *Institution de droit maritime* (Paris, 1803) 46.

[35] *Institution du droit de la nature et des gens* (Paris, (1803) 161.

not to be regarded as a vain jurisdictional right . . . but has the real effect of every other kind of property. It differs in nothing from that of the land."[36]

Theodore Schmaltz, German publicist, said in 1817:

"Moreover, the sea along the coast has always been regarded as the property of that country. . . ."[37]

Joseph Angell, the first American writer to deal specifically with the question, said in 1826:

"To the King, therefore, is not only assigned the sovereign dominion over the sea adjoining the coast, and over the arms of the sea; but in him is also vested the *right of property* in the *soil thereof.*" (Author's emphasis.)[38]

Robert Gream Hall, in his famous essay on *The Rights of the Crown and the Privileges of the Subject in Sea-Shores of the Realm* (London, 1830) 4, 2, said:

"The title of the King of England to the land or soil *aqua maris cooperta*, is similar to his ancient title to all the *terra firma* in his dominion, as the first and original proprietor and lord paramount."

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[36] 1 *Droit maritime de l'Europe* (tr. Johnson, New York, 1806) 186, 224.

[37] *Das Europäische Völker-Recht* (Berlin, 1817) 141.

[38] *A Treatise on the Right of Property in Tide Waters and in the Soil and Shore Thereof* (Boston, 1826) 18.

"This dominion and ownership over the British seas, vested by our law in the King, is not confined to the mere usufruct of the water, and the maritime jurisdiction, but it includes the very *fundum* or soil at the bottom of the sea."

William Woolrych, also writing in 1830, said:

"It is agreed, that as the King has the sovereign dominion over the seas adjoining to the coasts, and over the navigable rivers, he has also a right of property in the soil."[39]

That this was likewise the understanding of the Spanish and Latin-American world was indicated by Andrés Bello, Venezuelan diplomat and later professor of international law in Chile. Writing in 1832, he said:

"Regarding the sea, there is a generally admitted rule: Each nation has the right to consider as pertaining to its territory and subject to its jurisdiction the sea which washes its coast out to a certain distance."[40]

Jakob Saalfeld wrote in 1833:

"The shore and the part of the sea which washes it are the property of the state."[41]

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[39] *A Treatise on the Law of Waters and of Sewers, Including the Law Relating to Rights in the Sea* (London, 1830) 19.

[40] *Principios de Derecho de Jentes* (Santiago de Chile, 1832) 31.

[41] *Handbuch des Positiven Völkerrechts* (Tübingen, 1833) 93.

Henry Wheaton in the first edition of his *Elements of International Law*, which appeared in 1836, said:

> "Its [the sovereign's] rights of property and territorial jurisdiction are absolute and exclude those of every other nation."[42]

In 1844, A. W. Heffter, a German jurist, wrote:

> "It is admitted by most that the national property . . . extends . . . (c) over the whole coastal sea, as far as can be kept in exclusive possession, either from the coast or by the ever present naval power and defense works. . . ."[42a]

Juan Sala, a Mexican publicist, writing in 1845, said:

> "The various uses made of the sea near the coast make it susceptible of ownership as to that portion adjacent to the land. . . . This use of the sea coupled with the faculty they [nations] have to prohibit other nations from so doing, has converted the sea as to this portion thereof into property no different than the lands occupied by them."[43]

Hautefeuille, a French jurist, writing in 1848, said:

> "Territorial seas . . . are under the sovereignty of the nation who is mistress of the

[42] *Elements of International Law* (Philadelphia, 1836) 142-143.

[42a] Das Europäische Völkerrecht der Genewart (Berlin, 1844) 131.

[43] 2 *Sala Mexicano, o sea La Ilustración al Derecho Real de España* (Mexico, 1845) 11.

coast washed by them; they are under her dominion in the same manner and by the same title as the land.

". . . . according to primary law, the territorial sea can be brought under the sovereign domain, and . . . it is the property of the riparian nation."[44]

That this was recognized during all the prior period as the law of Spain is shown by Antonio Riquelme in 1849:

"The rule recognized by the law of nations for determining the legal status of the littoral seas is based on the idea that all is lawful for the lord of the coasts which his own preservation demands and which cannot prevent innocent use by others. . . . a right of property is possible over the littoral sea. . . ."[45]

We have found no authority to the contrary during the entire period of 1670-1845. As shown by the chronological chart of Opinions of Publicists and Jurists, Appendix, page 18, at least thirty-five writers from the leading nations of the world spoke of the ownership concept as being fully developed. They distinguished between "high seas" where ownership

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[44] *Des droit et des devoirs des nations neutres en temps de guerre maritime* (Paris, 1848) 231.

[45] 1 *Elementos de Derecho Público Internacional* (Madrid (1849), p. 209. Don Antonio Riquelme, who published his treatise while he was Chief of Section in the Spanish Ministry of State, probably closely represented the official view of the Government of Spain. This is a permissible inference from the position he occupied in that government. His work was published with royal permission.

was forbidden and the "territorial" marginal seas where ownership as well as sovereignty was recognized (subject to innocent passage).

There is not the slightest authority in support of plaintiff's reversal of position since the *California* case. The authorities show plaintiff was correct then in arguing that the ownership concept was fully developed by 1846-1848 rather than now when it argues that the concept was in 1845 "very immature if not foetal."

Again, as shown by the chart, Appendix, p. 18, this ownership as well as sovereignty concept with relation to the bed and subsoil has been recognized by substantially all publicists and jurists *since* 1845. At least eighty-five publicists and jurists have confirmed it during the period. Only eight have taken the opposite view, and they refer principally to the waters rather than the bed and subsoil. Sixteen have recognized the distinction between rights in the marginal belt and those in the high seas beyond, but do not touch directly on ownership. The official view of the United States was expressed at the League of Nations Conference at The Hague in 1930, where the United States declared:

> ". . . the sea-bottom and subsoil covered by the territorial waters, including fish and minerals, are the property of the United States or the individual states where they border."[46]

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[46] Reply of the United States to the Bases of Discussion, March 16, 1929, League of Nations Conference for the Codification of International Law, Bases of Discussion, C.74. M.39.1929. V. p. 128.

In fact, the only uncertainty which has existed during the 1670-1950 period has been as to the maximum extent of the territorial waters which may be included within a nation's boundaries. Even this uncertainty did not apply to the bed, subsoil, and minerals, because the countries which contended most strongly for a three-mile maximum limit actually claimed and possessed submarine mines, pearl beds, and exclusive fisheries beyond that distance.[47] Riesenfeld has proved beyond a question that there was not in 1836-1845 and has not been since that time any fixed maximum limit of territorial waters in international law, and that the three-league boundary of Texas was reasonable and carried with it all the rights commonly understood by nations to exist in lands and minerals beneath territorial waters.[48] Needs of the littoral State and acquiescence by other nations control the extent as long as within reasonable bounds.[49] Since The Hague Conference for the Codification of International Law in 1930, no publicist has contended that there is a maximum limit or that the bed, subsoil, and minerals are not subject to ownership.

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[47] Vattel, *The Law of Nations, supra*, p. 104: "Who can doubt that the pearl fisheries of Barem and Ceylon may lawfully become property?" See also Bingham, *Report on International Law of Pacific Coastal Fisheries* (Stanford, 1938), and Riesenfeld, *supra*, pp. 277-282.

[48] Riesenfeld, *supra*, pp. 258-259, 277-282.

[49] See boundary discussion, pp. 63-69, *supra*. It is significant that when Thomas Jefferson in 1793 provisionally proclaimed United States' jurisdiction over a three-mile belt he said it was the "smallest distance . . . claimed by any nation whatever." He later advocated the extended distance of sight from shore. 1 Moore, *Digest of International Law* (G.P.O., 1906) 702-703.

REPLY TO PLAINTIFF'S PRESENT CONTENTIONS

It is worthwhile to examine briefly at this point the arguments adduced by the plaintiff in support of its contention that the "Republic of Texas did not have the rightful jurisdiction over or ownership of the off-shore land."[50] Plaintiff first seeks to cast doubt on (a) "whether the Republic had, or ever asserted, any valid claim to ownership or sovereignty over the marginal sea." Irrespective of what this Court may ultimately find upon a full hearing of the case on its merits, it is obvious from the specific writings of these publicists that there is little doubt that this issue must ultimately be resolved in favor of the defendant.

Further, the plaintiff merely suggests the existence of a doubt without adducing the support of authorities which have adequately considered this question. The case of *Queen v. Keyn*, L. R. 2 Ex. D. 63 (1876), upon which plaintiff relies, is a thoroughly discredited case. It was decided by a narrow majority of two judges (13-11) and was immediately reversed by an Act of Parliament,[51] which in its preamble declared that:

> "the rightful jurisdiction . . . extends and *has always extended* over the open seas adjacent to the coast . . . to such a distance as is necsary for the defense and security of this island. . . ."

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[50] Brief in Support of Motion for Judgment, pp. 44-49.

[51] Territorial Waters Jurisdiction Act of 1878, 41 & 42 Vict., chap. 73.

Speaking of this case in *Carr v. Fracis Times & Co.*, [1902] A. C. 176, 181, Lord Halsbury said:

> "For whatever purpose *Queen v. Keyn* was quoted, this, I think, is manifest: speaking of it as an authoritative judgment, I cannot forbear from saying that, somewhat unusually, the Legislature of this country in the next session but one passed an Act of Parliament reversing that judgment—that is to say, affirming *in the strongest terms that the decision* which had been arrived at by the majority (a very narrow majority) in that case *was one that was not the law of England;* because the Act does not purport simply to alter the law, but it declares the law and says, in very plain terms, that that is and always has been the law of this country."

Judge John Bassett Moore in the *Wimbledon* case[52] before the Permanent Court of International Justice in 1927 said of the case:

> "Indeed, on a careful study of the case, it is difficult to avoid the conclusion that a vote of the majority was in no small measure determined by a powerful, but composite and somewhat torrential opinion of eighty pages delivered by Sir Alexander Cockburn, then Chief Justice of the King's Bench, *the disturbing effects of which it was necessary to remove in order that the majestic stream of the common law, united with international law, might resume its even and accustomed flow.* This was done by the Act of Parliament above mentioned which declared that the 'rightful juris-

[52] 2 Hudson, *World Court Reports*, 71-72.

> diction' of Her Majesty not only extended but had 'always extended' over her coastal waters and made British criminal law applicable to all offenses committed on the open sea within a marine league of the coast measured from low-water mark."[53] (Emphasis supplied.)

Plaintiff also quotes from the dicta of Viscount Haldane in the case of *Attorney-General for British Columbia v. Attorney General for Canada* [1941] A. C. 153, 174-175. (Plaintiff's brief, p. 46.) In plaintiff's *California* brief, Viscount Haldane's opinion was recognized as pure dicta and was followed by these words in the brief:

> "However, three years later the Privy Council answered the question it had refused to answer in the earlier case, and held that islands that arose in the sea within three miles of British territory as property of the Crown, because the bed of the sea within three miles of the coast is the property of the Crown. *Secretary of State for India v. Chelikani Rama Rao*, L. R. 43 Ind. App. 192 (1916)."[54]

—a decision which plaintiff now cites merely with the symbol "*cf.*"

It is thus apparent that the plaintiff's assertion "it is impossible to say, we think, that the idea of state ownership of the subsoil existed in 1845 in any sense in which Texas can now take advantage" rests upon a slender thread.

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[53] The case has again been recently criticized in H. A. Smith, *Law and Custom of the Sea* (London, 1948) 35.

[54] Brief in Support of Motion, *U. S. v. California*, p. 50.

Plaintiff's argument that "the Republic had a potential, but dormant, claim to paramount control and ownership" which passed to the United States in 1845 as an incident of national external sovereignty ignores the fundamental distinction which was pointed out so clearly by von Martens in 1789:

> "In order to better understand the rights of nations on the seas and waters in general, it is essential to distinguish property from empire. The first implies a right to enjoy a thing exclusively, and even to dispose of it; the second, the right to demand obedience, respect, and honor, from those who make use of it."[55]

The defendant respectfully submits that if it is permitted fully to develop the facts of international customs and usages supported by all existing opinions of publicists, domestic law dispositions of the states of the world, and the testimony of experts who have made lifelong studies of the question, it can remove any doubt that might exist as to the Republic's established and clearly defined property rights in the seabed of the Gulf of Mexico and the subsoil minerals within its three-league boundary.

This proprieary right was likewise recognized and incorporated in the domestic law which the Republic extended over its territory.

(3) *Under Domestic Law the Republic of Texas Owned a Separate Estate in the Mines and Minerals under the Three-League Belt.*

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[55] Von Martens, Georg Friedrich, *Précis du droit des gens moderne de l'Europe* (Paris, 1789) 159-160.

THE SPANISH LAW APPLICABLE TO MINERALS IN TEXAS

It is undisputed that Texas obtained its original system of mineral law from its predecessor Spanish and Mexican sources. Under this law the sovereign was the owner in place of the minerals in all lands within its boundaries, whether they be public, private, or common lands. This Spanish mineral law applied to Texas when it, as a part of Mexico, was under the dominion of Spain until 1821. It remained in effect when Mexico achieved its independence from Spain in 1821 and when Texas won its independence from Mexico in 1836. The Texas Constitution of 1836 so provided. Because of the volume of material on the nature and effect of this law which created *dominium* in the sovereign in a separate mineral estate, entirely severable from its govermental powers as well as public and private rights in the surface o. the soil, most of the authorities are set forth in a memorandum attached at page 69 of the Memoranda and Appendix. (Also see Dean Roscoe Pound's treatment of the subject, Memoranda and Appendix, page 1.)

The Spanish-Mexican mineral concepts had become so fixed in the property law of Texas that they were specifically retained when the common law was otherwise adopted by the Republic of Texas in 1840. Its adoption of the common law in that year specifically provided that it did not apply to "such laws as relate to the reservation of islands, salt lakes, licks, and salt springs, mines and *minerals of every description* made by the general and State governments,"[58]

[58] Laws, Republic of Texas, 4th Cong., 1840, pp. 3-4; 1 Gammel's Laws of Texas 177. Copy in Appendix.

As hereinafter shown, this separate ownership of mines and minerals was recognized by the United States in the draft of the original treaty for annexation of Texas which provided for cession of all its territories to the United States, "including vacant lands, mines, minerals," etc.[37] Mines and minerals were enumerated separately from lands. This treaty was defeated by the United States Senate. The counter-proposal made in the form of a Joint Resolution by the United States Congress provided that Texas retain its "vacant and unappropriated lands" and pay its own debts. It is highly significant that practically all of the many drafts of this counter-proposal contained a cession of "mines and minerals" along with forts, navy, etc. They were again enumerated and considered separately from lands. However, the "mines and minerals" were stricken from the Resolution before final passage in the House, and their omission was specifically noted with apparent approval in the Senate. Thus, the final Annexation Agreement, adopted by the Congress of the United States and later approved by Joint Resolution of the Congress of the Republic of Texas, not only left to the State its vacant and unappropriated lands but also its separate estate in the mines and minerals.

As a part of the annexation procedure, Texas adopted a new Constitution which was approved by the United States Congress. It included provisions heretofore quoted retaining all "laws now in force in the Republic of Texas," and providing that "rights

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[37] 4 Miller, Treaties and Other International Acts of the United States of America (1934) 697.

of property . . . shall remain precisely in the situation which they were before the adoption of this Constitution."

So fixed was the law of sovereign ownership of the minerals in Texas that a constitutional provision was necessary in order to effect a release of minerals to the then private owners of the soil when such action was deemed advisable in 1866.[58] Similar releases were made in 1869 and 1876. As later held in *Cox v. Robison*, 105 Tex. 426, 150 S. W. 1149 (1912), these releases applied only to minerals in lands on which title to the surface had previously passed from the sovereign. They were retrospective, not prospective, and did not amount to a union or merger of the mineral estate and the surface of the State's unsold lands.

### HISTORY OF SOVEREIGN SEPARATE MINERAL ESTATE

The history and precise nature of the rights vested in the crown, both as to Spain and its colonial possessions in the Americas, are described by Gamboa in his *Commentaries on the Mining Ordinances of Spain* (1761), translated in Rockwell's *Spanish and Mexican Law* (1851). Gamboa says:

> "In Spain, under the law of the *Partida*, the *property* of the mines was so *vested* in the king that they were held not to pass in a grant of the land, although not excepted out of the grant . . .
>
> "Philip II. acting under the authority of the council and chief accountants, *vested the mines wheresoever situate, and whether in public or private ground*, in the crown."

[58] Art. VII, Sec. 39, Constitution of 1866; 5 Gammel's Laws 880.

This was the accepted status of sovereign ownership of the minerals when vast new sources of gold, silver, quicksilver, lead, and other deposits were discovered in Spain's American possessions. Even oil, tar, and pitch were known and being used for less valuable purposes. By the time Gamboa published his *Commentaries* in 1761, there was a great demand in Mexico for a new code of mining laws, and this demand resulted in a compilation by Mexican authorities of the mining ordinances of May 22, 1783, later promulgated by King Charles III, which remained in effect as the law of Mexico and Texas on this subject.

This famous code, quoted in the memorandum in the Appendix, enumerated the minerals owned in place by the sovereign and made subject to exploration as

> ". . . not only the mines of gold and silver, but also those of precious stones, copper, lead, tin, quicksilver, antimony, calmine, bismuth, rock salt and other stoney matter (fossils), be they ores or semi-minerals, *bitumen, and liquids (juices) of the earth. . . .*" (Rockwell *supra*, pp. 54-55.)

Dr. Walter Howe has recently published a book, *The Mining Guild of New Spain and Its Tribunal General, 1770-1821* (Harvard University Press, 1949), in which he describes the sovereign's rights under the "famous mining ordinances of 1783" as follows:

> "*Ultimate ownership* of mineral deposits continued to rest with the crown, while the 'dominium utile' was conceded to individuals. This

provision, carried over virtually without change into the Mining Code of the Mexican Republic, is of interest in giving precedent to the provision of Art. 27 of the Constitution of 1917 which declares the nation to be *ultimate owner* of all mineral deposits." (p. 67.)

In his comprehensive treatise on *American Law Relating to Mines and Mineral Lands* (1897, 1903, 1914), Curtis H. Lindley says:

"Ownership of mines under Mexican law.—Under the laws in force in Mexico at the date of the treaty of Guadalupe Hidalgo, mines *whether in public or private property*, belonged to the supreme government. (pp. 199-220.)

"*No interest* in the minerals of gold and silver passed by a grant from the government of the land in which they were contained, without express words designating them. Such grant only passed an interest in the soil *distinct from that of the minerals* . . . .

"In other words, *there was a severance of the title to the minerals from the title to the land.*" (p. 200.)

COURT DECISIONS

There are several Texas cases and texts directly in point on this subject. They are quoted from at length in the memorandum in the Appendix. One, *State v. Parker*, involved salt under a large lake in Hidalgo County.

In *Cox v. Robison*, 105 Tex. 426, 150 S. W. 1149 (1912), the Supreme Court of Texas construed the effect of the 1866 and 1876 constitutional releases of

minerals to the then owners of the soil as applying retrospectively and not prospectively. They had no effect on the existing separate mineral ownership of the State in unsold lands and minerals.

In *United States v. Castillero*, 2 Black 17 (1862), this Court was unanimous in holding that under the Spanish Mining Ordinance of 1783, which remained in force in Mexico in 1848, the Crown and its successor, the Republic of Mexico, owned the minerals as a separate estate.

As to this, Mr. Justice Clifford, writing for the majority, said:

> "*Property* in mines not discovered and registered according to law, *whether the mine was on public or private lands*, was *vested*, as has already appeared, exclusively in the Supreme Government, so that private persons could not acquire it or any interest in it in any other mode than that prescribed in the provisions of the mining ordinance. . . ." (p. 169.)

and later

> "Mines under Mexican laws, as before explained, *whether situated in public or private lands, belong* to the Supreme Government, and private persons can only acquire a title in one not previously discovered and made individual property according to law, by conforming substantially to the conditions ordained in the provisions of the 4th article of the Mining Ordinance as herein previously recited. . . ." (p. 190.)

We will not burden the Court with extensive quotations from this lengthy opinion. A more thorough-

going examination of the sovereign rights of Spain, Mexico and Texas in undiscovered minerals wherever located could hardly be found.

Without exception, every available authority on the subject concludes that the Spanish-Mexican-Texas mineral law vested in the sovereign a separate and distinct ownership of the mineral estate in all lands within the borders of the Republic.

THE MINERAL ESTATE INCLUDES OIL

The authorities uniformly concede that oil was included within the Spanish Mining Ordinances of 1783 and its subsequent application in Mexico, Texas, and South American countries. Many of them are cited and quoted from in the memorandum on this subject in the Appendix.

As heretofore pointed out, the ordinances were drawn up in Mexico after a demand arose there for a code more applicable to the problems of mining in "New Spain." They were the first Spanish ordinances which specifically described liquid substances as within "all the mines and minerals reserved to the Crown." Article 22, Title 6, listed the minerals as including "bitumens or juices of the earth.

According to Mexican history, oil, pitch and tar were known and used long prior to 1783. A detailed account is contained in *Mexico's Oil* (1940), a publication issued by the Mexican Government.

Defendant has an abundance of evidence in the form of letters, newspaper articles, and testimony showing that oil was also known and had valuable uses in the precise area in controversy long prior to 1845.

THE SEPARATE MINERAL OWNERSHIP EXTENDS BENEATH RIVERS, LAGOONS, AND OTHER TERRITORIAL WATERS

Under Spanish, Mexican and Texas law the sovereign's separate mineral ownership extended to all minerals within the "realm," "borders," or "jurisdiction," whether in private, public, or common lands.

Rivers, ports, public roads, the sea and its shores were said by the early Spanish law to be common or public. Gamboa says the crown's mineral ownership was in all lands "wheresoever situate" in the entire realm "whether in public or private ground." Solorzano says "where they are found," whether "in public places or in lands and possessions of individual persons." He specifically refers to "rivers and public waters."[59]

Lares also says "wherever they might be found, whether out in public lands, or whether privately owned estates or lands." Fonseca and Urrutia are in accord, showing that salt was taken from the lakes themselves, the basins and shores of the lakes, and the sea.[60]

In the Philippine Islands, which were also a part of the Spanish Colonial empire, the same laws are in force as prevailed throughout the Spanish Colonies in America. In the recent case of *W. H. Lawrence v. Garduño*, the Supreme Court of the Philippines declared that under the old mining laws of the Philippines, inherited from Spain, and under its new laws which went into effect November 15, 1935,

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[59] Juan de Solorzano Periera, *Politica Indiana* (1701), Book VI, Chap. XIII.

[60] Fonseca y Urrutia, *Historia General de Hacienda* (Mexico, 1845 and subsequent years), Vol. IV, pp. 6-140.

> "Mineral deposits whether found in or under public or private lands or beneath rivers, lakes, lagoons, gulfs, bays, and seas within the maritime jurisdiction of the Philippines belong to the State and the disposition, exploitation, development or utilization shall be at the discretion of the State."

In Scotland, another civil law country, this rule of law was described in *Lord Advocate v. Clyde Navigation Trustees*, 19 Sess. Cas. (4th ser.) 174, 177-178 (1891). The Court said:

> "Is the Crown's right in that strip of sea proprietary, like the Crown's right in the foreshore and in the land—or is it only a protectorate for certain purposes, and particulary navigation and fishing?
>
> I am of the opinion that the former is the correct view. . . . Such I consider is the result of all the best authorities—Scotch, English, and foreign. . . . It has been affirmed on many occasions by high judicial authorities both in Scotland and England. It has also received practical effect in various judgments with respect, inter alia, *to minerals under the sea*, musselbeds and oyster-beds, maritima incrementa, and flotsam and jetsam." (Citing cases.)

All precedents on the subject indicate that the sovereign's separate mineral ownership was coextensive with the state's boundaries, including inland and coastal waters of the marginal belt. For instance, under the same Spanish law by which Texas claims its inland water and marginal belt minerals, Chile has for nearly 100 years produced or leased for pro-

duction the undersea coal deposits under the Pacific off the coast of Lota. Today, the oldest mine has 50 miles of tunnels from the upland into the producing veins as far as four miles from shore beneath Chile's marginal belt along the Pacific Ocean.

Under the same law, Peru owns and operates or leases a coal mine beneath its territorial sea in the Pacific, and Venezuela, Peru, Argentina, and Mexico have wells producing oil from beneath their marginal belts on the Atlantic, Pacific, and Gulf of Mexico, as well as from beneath other territorial waters. There are 2,000 wells in Lake Maracaibo, Venezuela, the farthest well extending 11 miles out in the water.

Upon a hearing of this case on the merits, the defendant will submit additional evidence in support of the foregoing facts and precedents, including maps and technical data with respect thereto, and specifically showing their value, knowledge, and use by the Republic of Texas.

Texas has continuously asserted title to the minerals under its submerged lands. Since 1917 there have been laws authorizing mineral leases on river beds and channels. Since 1919, mineral leases have been authorized on all "salt water lakes, bays, inlets, marshes, reefs . . . and that portion of the Gulf of Mexico within the jurisdiction of Texas."[61] The maintenance of its separate mineral estate in

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[61] Acts 1919, 36 Leg. 2d called sess. ch. 19; 19 Gammel's Laws of Texas 51.

these lands is best evidenced by the Legislature's wording of the present Act in 1939:

> "The mineral estate in river beds and channels and in all areas within tidewater limits, including islands, lakes, bays, and the bed of the sea, belonging to the State of Texas, are hereby set apart and dedicated to the permanent school fund."[62]

### THE MINERAL ESTATE WAS SEVERABLE FROM THE SOIL AND SOVEREIGNTY; IT DID NOT PASS TO THE UNITED STATES

As heretofore mentioned and hereinafter shown, the separate mineral ownership by the Republic of Texas was known to and considered by the United States Congress. The provision for cession of the mines and minerals was stricken from the draft of the Annexation Resolution. They were not ceded by any other clause in the Resolution, and were intended to be ~~reserved to~~ the State of Texas, as evidenced by their omission from the cession, and by the ~~reservation~~ of "vacant and unappropriated lands lying within its limits." Although separate from the ownership of the soil, a general reservation of "lands" includes separate mineral estates. *United States v. Castillero*, 2 Black 17 (1862).

Under the mineral laws of Texas, the separate mineral estate did not pass except by specific grant. It did not pass by the transfer of national sovereignty to the United States. *United States v. Castillero*,

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[62] Art. 5421c-3, Sec. 2, Vernon's Annotated Texas Civil Statutes.

supra; *Moore v. Smaw* and *Fremont v. Flower*, 17 Cal. 199 (1861). In the latter opinion by Mr. Justice Field, then a member of the Supreme Court of California, it was said:

> "*Such ownership stands in no different relation to the sovereignty of a State than that of any other property which is the subject of barter and sale.* Sovereignty is a term used to express the supreme political authority of an independent State, or nation. Whatever rights are essential to the existence of this authority are rights of sovereignty. Thus the right to declare war, to make treaties of peace, to levy taxes, to take private property for public uses, termed the right of eminent domain, are all rights of sovereignty, for they are rights essential to the existence of supreme political authortiy. . . . *The minerals do not differ from the great mass of property*, the *ownership of* which may be in the United States, or in individuals, without affecting in any respect the political jurisidiction of the State. They may be acquired by the State, as any other property may be, but *when thus acquired she will hold them in the same manner that individual proprietors hold their property, and by the same right; by the right of ownership, and not by any right of sovereignty.*" (pp. 218-219.)

It therefore follows that regardless of who may have or not have technical ownership of the bed of the sea or the waters of the Gulf of Mexico within the original boundaries of Texas, the State's Public School Fund nevertheless owns the mineral estate therein and thereunder.

(4) *Under the Common Law Adopted in 1840 the Republic of Texas Owned the Bed beneath the Three-League Belt as well as the Mines and Minerals Which It Contained.*

By adoption in 1840 of the common law "as a rule of decision" the Republic of Texas adopted a system of domestic law clearly providing for a proprietary right of ownership in the sovereign to the seabed and subsoil of all of the coastal submerged lands within its declared boundaries. The title and ownership of Texas under the common law is distinct from, and in addition to, its separate estate in the minerals as established under its Spanish-Mexican mineral law.

WHAT "COMMON LAW" WAS ADOPTED

By an act of the Congress of the Republic of Texas it was provided:

> "That the Common Law of England (so far as it is not inconsistent with the Constitution or the Acts of Congress now in force) shall, together with such acts be the rule of decision in this Republic and shall continue in full force until altered or repealed by Congress."[39]

It is clear from the decisions of the Texas courts that the common law considered to have been adopted under this statute is to be determined *as of the time of the adoption of the statute* (1840), and not

[39] Laws, Rep. of Texas, 4th Cong. 1840, 3 (2 Gammel's Laws of Texas 177). Sec. 2 of this same act referred to above at p. 113, retained the Spanish and Mexican laws relating to the reservation by the sovereign of mines and minerals of every description.

as of 1776, and that the common law as of 1840 is to be ascertained in the light of not merely the decisions of the courts of England but also the decisions in the State and Federal courts of the United States as of that time. *Grigsby v. Reib*, 150 Tex. 597, 153 S. W. 1124 (1913); *Dickson v. Strickland*, 114 Tex. 176, 265 S. W. 1012 (1924); *Walento v. Wolter*, 186 S. W. 873 (Tex. Civ. App. 1916, error ref.).

Speaking of this matter in *Dickson v. Strickland*, the Texas Supreme Court said:

> "It is, however, not so much the common law as it may have existed in England, which was adopted by the Act of 1840, as it is the common law of England as understood and declared by the different courts of the United States to which we look in determining a question of first impression in this state."[90]

**COMMON LAW AS TO OWNERSHIP OF THE MARGINAL SEA AS ADOPTED BY TEXAS**

In *Manry v. Robison*, 122 Tex. 213, 229-230, 56 S. W. 2d 438, 445-446, the Texas Supreme Court said:

> "Under the English common law the sovereign owned only those portions of riverbeds which were within tidewater limits. . . . in the tidewater sections of navigable streams the King, it is said, owned the rivers, including the beds but held them in trust for the public. . . . This ownership, however, was based, not upon navigability alone, *but upon the sovereign's*

[90] 114 Tex. at 204, 265 S. W. at 1023.

> *ownership of the sea.* Insofar as the tide ebbed and flowed, the rivers were regarded as arms of the sea, and since the King was Lord of the sea, he was proprietor of the land beneath it. . . . such in brief were the English common law rules as to the ownership of riverbeds when we adopted that system of laws as the rule of decision."

This determination by the Texas Supreme Court as to the common law of England and of the United States in 1840 is borne out by an independent examination of the relevant authorities. The most recent authoritative opinion as to the character of the common-law concept of ownership of the bed of the marginal seas as of 1840 is found in the opinion of this Court in *United States v. California*, 332 U.S. 19 (1947), in which the following statement is made concerning the opinion in *Pollard's Lessee v. Hagan*, 3 How. 212 (1845):

> "As previously stated this Court has followed and reasserted the basic doctrine of the *Pollard* case many times. And in so doing it has used language strong enough to indicate that the Court *then believed* that states not only owned tidelands and soil under navigable inland waters, but also *owned soils under all navigable waters* within their territorial jurisdiction, *whether inland or not.*"

Numerous English authorities indicate that the English King was understood as having sovereignty as well as ownership over the bed of the adjacent waters of the sea. So Lord Hale said:

> "The sea is either that which lies within the body of a county or without. . . . The part of

the sea which lies not within the body of a county, is called the main sea or ocean. The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the King of England, whether it lie within the body of a county or not. . . . In this sea the King of England hath a double right, viz. a right of jurisdiction which he ordinarily exerciseth by his Admiral and a right of property or ownership."[91]

Blackstone's Commentaries, the influence of which on the early common law of the American States cannot be exaggerated, said this with reference to islands rising in the sea:

"For, as the King is Lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable that he should have the soil, when the water has left it dry." 2 Blackstone Commentaries, 261-262.

In 1830 Robert Gream Hall said:

"Over the British seas, the King of England claims an absolute dominion and ownership, as Lord Paramount against all the world. Whatever opinions foreign nations may entertain in regard to the validity of such claim, yet the subjects of the King of England do, by the *common law of the realm*, acknowledge and declare it to be his ancient and indisputable right.

"This dominion and ownership over the British sea vested by our law in the King, is not con-

[91] Hale, *A Treatise in Three Parts: Pars Prima, de Jure Maris et Brachiorum Ejusdem*, reprinted in Hargrave's *Law Tracts* (London, 1787) 10-12.

fined to the mere usufruct of the water, and the maritime jurisdiction, but it includes the very fundum or soil at the bottom of the sea." Hall, *An Essay on the Rights of the Crown in the Seashores of the Realm* (1830) 2, reprinted in Moore, *History & Law of the Foreshore and Sea Shore* (3rd ed. 1888) 668.

Lord Wynford speaking for the Privy Council in 1829 said:

> "The sea is the property of the King, and so is the land beneath it, . . . .
>
> ". . . The laws of England and Jersey [are] precisely the same with regard to land that is below ordinary tide, dealing with such land as a part of the bottom of the sea, and vesting the original right to it in the King." *Benest v. Pipon*, 1 Knapp 60, 12 Eng. Rep. 243, 246, 247 (1829).[92]

The same rule was recognized by the Scotch Court of Session as being the common law of England as well as in accord with the civil law in Scotland in *Officers of State v. Smith, 8 Sess. Cas.* (2d ser.) *711*, 723 (1846), aff'd *sub nom. Smith v. Earl of Stair*, 6 Bell's App. Cases (House of Lords, 1849), where the question raised was whether the Crown's interest in the shores of the realm was a "right of property" or only a "general guardianship in interest

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[92] This same view was reiterated in *Free Fishers of Whitstable v. Gann*, 20 C.B. (N.S.) 1, 144 Eng. Rep. 1003, 1011, 1012 (House of Lords, 1854), in *Lord Fitzhardinge v. Purcell*, L.R. 2, Ch. 139 (1908) and in *Secretary of State for India v. Chelikani Rama Rao*, 43 Indian App. Cas. 192 (Privy Council, 1916.)

over and in the shore, in order to prevent certain public purposes being interfered with." Lord Cockburn in deciding the case in accord with the former view stated:

> "I know nothing which I think might be predicated with greater safety or that less requires formal proof, than that the bed of the British seas belongs in property to the British Crown." See *Gammell v. Commissioner of Woods and Forests*, 3 MacQueen's App. Cas. 419, 420 (House of Lords, 1859).

This English common law view as of 1840 was clearly understood by American text writers of the period and was adopted by the courts.

Angell, in his work on *Tidewaters*, published in 1826, said:

> "Indeed, in England, the King is regarded as universal occupant, and the presumption is, that all property was originally in the Crown. Hence it is said that all lands are holden mediately or immediately from the Crown, and that the King has the *absolutum et directum dominium*
>
> . . . .
>
> "To the King, therefore, is not only assigned a sovereign dominion over the seas adjoining the coast, and over the arms of the sea: that in him is also vested the right of property in the soil thereof."[93]

Representative of numerous decisions of this Court which attest that the common law of England

[93] Angell, *The Right of Property in Tidewaters* (Boston. 1826) 17, 18.

prior to 1840 was that the sovereign owned the seabed and subsoil minerals within its marginal belt are *Weber v. Board of Harbor Commissioners*, 18 Wall. 57, 65 (1873), and *Shively v. Bowlby*, 152 U.S. 1, 13 (1894). See also the discussion in *Corfield v. Coryell*, 6 Fed. 546, No. 3230 (E.D. Pa. 1823).

If there was any question about it prior thereto, it is clear that as of 1840, when the Republic of Texas adopted the common law, it was vested with proprietary rights in the seabed and subsoil and that the Texas Supreme Court was correct in so declaring. In any event, its decision as to the meaning and intent of this State statute is binding on this Court. *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249 (1933); *Federation of Labor v. McAdory*, 325 U. S. 450 (1945).

Therefore, as to this point, defendant respectfully submits that under its domestic law the Republic of Texas was vested with ownership of the seabed and subsoil within its three-league gulfward boundaries and that this ownership was in addition to that which it had in the minerals underlying the area under its special mineral law.

(5) *The Republic of Texas Acquired at Least Those Proprietary Rights in the Area Which the United States Was Said to Have Acquired in the Marginal Belt of the Original Thirteen States in United States v. California.*

Defendant further submits that the Republic of Texas in any event acquired as much title and as many rights to the seabed, subsoil, and minerals

within its three-league gulfward boundary as the United States was said to have acquired in the marginal belt adjacent to the original Union of thirteen States in *United States v. California.* There the Court said:

> "That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact . . . and this assertion of national dominion over the three-mile belt is binding upon this court." (332 U.S. at 33.)

The assertions of national dominion referred to by the Court involved the exercise of governmental powers regulating seal fishing, pollution, anti-smuggling treaties, and the President's Continental Shelf Proclamation. None of them involved an assertion of ownership or an application of domestic property law.[94] The Republic of Texas went much further in its "assertion of national dominion" over the

[94] The Continental Shelf Proclamation of September 28, 1945, was followed by an Executive Order of the same date which reads:

> ". . . Neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit." (486-487.)

A White House release on the same day with the Department of State Bulletin said:

> "The policy proclaimed by the President in regard to the jurisdiction over the continental shelf does not touch upon the question of Federal versus State control. It is concerned solely with establishing the jurisdiction of the United States from an international standpoint." (484.)

three-league belt. The Texas Congress included it within its statutory boundaries and extended thereover its property and regulatory laws; reserved the right of coastal trade in a treaty with England; outfitted and maintained a navy for protection of the area; brought it within the jurisdiction of its maritime courts; and exercised its functions of government and enforced its laws thereover the same as over its upland territory.

It is respectfully urged that these assertions of national dominion by the Republic of Texas over its three-league belt are as binding upon this Court as similar original assertions by the United States with respect to the marginal belt of the original United States.

While the Court did not use the term "ownership" in its opinion in the *California* case, and while it eliminated the words "of proprietorship" from the decree requested by the Attorney General of the United States, its opinion and decree has been and is now being interpreted by plaintiff to include ownership and title.[98]

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[98] This was the interpretation of Mr. Justice Clark, then Attorney General, before the Committee on the Judiciary in 1948. He said:

> "They did not limit the rights we had. We had limited them to proprietorship, but the Supreme Court said 'No'; they are greater than proprietorship. Take proprietorship out, and what did they say? 'Possessed of paramount rights in, and full dominion and power over,' they said. In other words, they gave us greater rights than we had put in the decree itself.
>
> "Senator McCARRAN. But refused to say that it was title: and refused to say that the title was in fee simple, notwithstanding the fact that you asked for it.

If this interpretation of the Court's decision by federal officials is correct, then, by the same reasoning employed in the *California* case, the Republic of Texas became the owner of the lands and minerals in controversy through its assertions of national dominion over the area. This ownership having been admitted to be severable from the governmental powers by which it was acquired[97] and not having been transferred by the State to the United States, the ownership remains in the State of Texas. As said in Dr. Charles Cheney Hyde's interpretation of the Texas Annexation Agreement,

> "It is believed to be reasonable to declare that when Texas entered the Union, it surrendered only its governmental powers of national sov-

"Mr. CLARK. They said this. You can have an injunction; you do not get injunctions unless you have got some rights and got some power. You have got some title.

"Senator DONNELL. Did you consider included in 'paramount rights in and full dominion and power over,' quoting the Court's language, that it included fee simple title?

"Mr. CLARK. Definitely so. The definitions that I have looked up on those terms certainly include ownership, most perfect ownership." Joint Hearings Before the Committees on Judiciary, 80th Cong., 2d Sess., on S. 1988 and Similar House Bills, February-March, 1948, 624-625.

Solicitor General Perlman also testified that the rights are based upon title. He said:

"Well, of course, it rests on the claim of title. If we had no title, we are not entitled to it." Hearing before the Committee on Interior and Insular Affairs, *supra*.

[97] See footnotes 10 and 11 and p. 8, *supra*. Also see discussion of severability of ownership and sovereignty by Dean Pound at p. 1 of Memoranda and Appendix.

ereignty—not its lands or rights of substance theretofore acquired by its own use of those powers. These rights of substance that Texas had acquired were distinct and therefore separable from the paramount governmental powers originally employed in making the acquisition. In a word, the Texan rights of substance did not pass to the United States by transfer of those governmental powers of national sovereignty. Again it should be noted that these rights of substance were not ceded to the United States by the annexation agreement. . . ."[98]

If the interpretation by federal officials of the meaning of the *California* decision is incorrect and the Court only intended to decree to the United States governmental powers of regulation and control, as some have argued by reason of its elimination of "proprietorship" from the decree and by reason of certain language in the Court's opinion in *Toomer v. Witsell*, 334 U.S. 385, 402, then plaintiff is in no event entitled to judgment enjoining the State of Texas from its actions in the area. Congress has not entered the field but has left it as completely to the State as it had left the regulation and control of fishing to the State of South Carolina.[99] This is developed under II F *infra*.

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[98] Charles Cheney Hyde, Memorandum on *United States v. Texas*, Appendix, p. 16.

[99] See *Toomer v. Witsell*, *supra*, p. 393, and *Manchester v. Massachusetts*, 139 U.S. 240, 266.

### b. The Ownership and Proprietary Rights of the Republic of Texas in These Lands and Minerals Were Not Ceded to the United States by the Annexation Agreement

*Legal Nature of the Agreement*

The Annexation Agreement is a legislative compact between the United States and the Republic of Texas and is of the same nature and has the same effect as a treaty.[100] President Tyler, in a letter of instructions to the United States' negotiator, Andrew J. Donelson, said:

> "By whatever name the agents conducting the negotiations may be known, whether they be called commissioners, ministers, or by any other title, the compact agreed on by them in behalf of their respective governments would be a treaty, whether so called or designated by some other name. The very meaning of a treaty is a compact between independent States founded on negotiation."[1]

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[100] See Washburn, "Legislative Compact with Foreign Nations," 55 Am. L. Rev. 68, 84 (1921), where it is said that although this type of formal compact and a treaty are "unlike" in their nature and form. . . the result accomplished may be the same."

[1] That this was the concept accorded to the Agreement by other persons most intimately connected with it is shown by the following remarks made in the House of Representatives on January 9, 1845, by Mr. Brengle:

"This is a treaty. The calling it a joint resolution, or anything else, does not make it the less a treaty. It has all the characteristics of a treaty. The parties to it are two sovereign States. The object intended to be effected is to be done by the mutual consent and agreement of both, and it is made for the public welfare of both." Appendix to Cong. Globe, 28th Cong., 2d Sess. 85.

The perpetual character of compacts of this type is stated in Wheaton, *International Law* (5th ed. 1916), as follows:

> "General compacts between nations may be divided into what are called transitory (*dispositive* or *executed*) conventions, and treaties properly so termed (sometimes called *executory* conventions). The first are perpetual in their nature, so that, being once carried into effect, they subsist independent of any change in the sovereignty and form of government of the contracting parties. . . . Such are treaties of cession, boundary, or exchange of territory, or those which create a permanent servitude in favour of one nation within the territory of another." (368.) (Italics his.)

The Annexation Agreement, admitted by plaintiff to be "controlling,"[2] governs the subsequent relations of the United States and Texas. It continues, therefore, to be the "measure and rule of the rights" of each, as shown by the following statement of Vattel in his 6th American edition, published in 1844, during the time of the negotiations for annexation:

> ". . . a nation . . . may lawfully subject itself to a more powerful nation on certain conditions agreed to by both parties: and the compact or treaty of submission will thenceforth be the measure and rule of the rights of each. For since the people who enter into subjection resign a right which naturally belongs to them, and transfer it to the other nation, they are perfectly at liberty to annex what conditions they

[2] Brief for the United States, p. 15.

please to this transfer; and the other party, by accepting their submission on this footing, engages to observe religiously all clauses of the treaty."

Vattel also gives a rule for the subsequent interpretation of an agreement of this nature as follows:

> "*Whatever tends to change the present state of things is also to be ranked in the class of odious things:* for the proprietor cannot be deprived of his right, except so far, precisely, as he relinquishes it on his part; and in case of doubt, the presumption is in favour of the possessor. . . . Here also may be applied, in many cases, the rule we have mentioned in Section 301, that the party who endeavours to avoid a loss, has a better cause to support than he who aims at obtaining an advantage." Vattel's *Law of Nations* (Chitty's ed., 1834), 265. (Author's emphasis.)

(1) *Background, history, and Rules of Interpretation.*

The Annexation Agreement being a compact in the nature of a treaty or contract between independent nations, the rules applicable to treaties, conventions, and other international agreements apply.[3] Plaintiff admits the applicability of these rules by frequently relying upon them in its argument on the interpretation of the Annexation Agreement.[4]

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[3] See Ralston, *The Law and Procedure of International Tribunals* (1936) 5.

[4] The government bases its construction of the Annexation Agreement upon "the joint purpose of Congress and Texas" (p. 29), the "practical construction, by the state itself" (p. 33), "The party's purpose" (p. 12), or "fundamental aims" (p. 29).

The purpose of the interpretation of an agreement of this nature is to discover the understanding and intention of the parties at the time the contract or agreement was entered into.[5]

Negotiations for the annexation of Texas began with the preparation of the subsequently unratified treaty[6] in which the Republic of Texas offered to cede to the United States "all the territories of Texas, to be held by them in full property and sovereignty." (Article I.) This cession was to include

> "all public lots and squares, vacant lands, mines, minerals, salt lakes and springs, public edifices, fortifications, barracks, ports and harbors, navy and navy yards, docks, magazines, arms, armaments, and accoutrements, archives and public documents, public funds, debts, taxes and dues unpaid at the time of the exchange of the ratifications of this treaty."

In return for this cession, the United States was to "assume and agree to pay the public debts and liabilities of Texas . . . at the time of annexation. . . ." (Article V.)

One of the main reasons for the failure of the United States Senate to ratify the original annexation treaty on June 8, 1844, was that many of the

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[5] *Nielsen v. Johnson*, 279 U.S. 47, 51-52 (1929); *Ross v. McIntyde*, 140 U.S. 453, 457 (1891); *Santovincenzo v. Egan*, 284 U.S. 30, 38 (1931); *Clark v. Allen*, 331 U.S. 503, 513 (1947); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *United States v. Texas*, 162 U.S. 1, 36 (1896); *Tucker v. Alexandroff*, 183 U.S. 424, 436-437 (1902); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928).

[6] Appendix, p. 51.

members of the Senate were unwilling for the United States to assume the debts and liabilities of the Republic of Texas in exchange for its "worthless lands."[7] Other Senators, unwilling for the United States to assume Texas' debts, stated that Texas should keep its lands to pay its own debts.[8] The treaty was defeated by a vote of 35 to 16.

However, the question of annexation was kept open with the government of Texas, and it became one of the greatest political issues of the day, with Polk winning the Presidency on a platform which called for annexation of Texas. After the election of 1844, the second session of the same Congress that had rejected the original treaty of annexation made a counter proposal to Texas whereby it would retain its lands and assume its own debts. The counter proposal was adopted in the form of a Joint Resolution March 1, 1845. The main objection of the United States Senate to the original unratified treaty was not present in the Joint Resolution. It is this agreement which controls and which must be interpreted by this Court in determining the rights of the United States and Texas.

In ascertaining the intention of the parties to this agreement, recourse must be had to "the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter, and to

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[7] Appendix to Cong. Globe; 28th Cong., 1st Sess. 686; Appendix to Cong. Globe, 28th Cong., 2nd Sess. 275.

[8] Cong. Globe, 28th Cong., 2nd Sess. 184; Appendix to Cong. Globe, 28th Cong., 2nd Sess. 121, 143, 150, 195, 213, 234, 402.

their own practical construction of it." *Factor v. Laubenheimer*, 290 U.S. 276, 294-95 (1933).[9]

Plaintiff's theory of the case against Texas' defenses calls for the consideration of extrinsic evidence in ascertaining the intention of the parties to the Annexation Agreement. Plaintiff does this by basing its brief on its own erroneous factual interpretation of the intention of the parties to the Annexation Agreement.[10] Had the Court known that plaintiff would base its entire case on disputed issues of fact concerning the intention of the parties to the Annexation Agreement, it is probable that defendant's pending motion for the appointment of a special master would have been heretofore granted. This is indicated by the practice of the Court in the past, which was the subject of the following discussion by Mr Hyde:

> "The Supreme Court is not disposed to forbid recourse to, or to decline itself to rely upon, diplomatic exchanges or correspondence indicating the views of negotiators of a treaty, of which the interpretation is uncertain. The fact of uncertainty is seemingly regarded as made apparent by the divergency of views of opposing litigants, notwithstanding the form of the text. The Court has not sought to postpone consideration of such evidence until, after exhausting other modes or processes of interpretation, it

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[9] *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Clark v. Allen*, 331 U.S. 503, 513 (1947); *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929); *Ross v. McIntyre*, 140 U.S. 453, 475 (1891); *Terrace v. Thompson*, 263 U.S. 197, 223 (1923); *United States v. Texas*, 162 U.S. 1, 23 (1896); *Pigeon River Improvement, Slide & Boom Co. v. Cox*, 291 U.S. 138, 158 (1934).

[10] See p. ....., *supra*.

> still remains itself in doubt. Thus it has not been wary of utilizing such data in order to supplement or support conclusions to be drawn from the face of an instrument, or as a means of establishing others at variance with a meaning seemingly deducible from its terms. The significant thing is the readiness with which the Court turns to such forms of preparatory work as reasonable and applicable sources of interpretation."[11]

The examination of all the available evidence in determining the intention of the parties to a compact or agreement of this nature is recognized by the foremost authorities on the interpretation of treaties as the only proper way to ascertain correctly the intention of the parties.[12] He says that the preparatory work should be heard by the court interpreting the treaty or agreement.[13]

With this in mind, the State presents here only enough to show that plaintiff is not entitled to judgment as a matter of law; that disputed issues of fact necessary to a determination of the intention of the parties have been raised; and that the State should be given the opportunity to present all of its evidence bearing on this intention.

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[11] II Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2d rev. ed. 1945) 1482.

[12] Lauterpacht, *Some Observations on Preparatory Work in the Interpretation of Treaties*, 48 Harv. L. Rev. 549, 573 (1935).

[13] *Id.* at 552, note 3.

(2) *All property to be ceded to the United States was specifically named, and this enumeration did not include the lands or minerals here in controversy. All other property remained in the State of Texas.*

Paragraph 2 of the Joint Resolution of the Congress of the United States, March 1, 1845, provides that

> ". . . said state, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said republic of Texas, shall retain . . ." (Appendix, p. 58.)

It is clear from this language that the Agreement itself was not a present cession of property to the United States. The parties contemplated that after the State was admitted into the Union it was to cede to the United States certain property therein specified. These cessions were not to be made by the *Republic* before it could be admitted into the Union, but by the *State* "when admitted into the Union."

That this was the intention of the parties is borne out by the subsequent interpretation of this particular provision by both parties. For example, Article 13, Section 8, of the Constitution of the State of Texas (1845), adopted "in accordance with the provisions of the Joint Resolutions for annexing Texas to the United States," which was accepted and ap-

proved by the Congress of the United States in the Joint Resolution for the admission of the State of Texas into the Union, December 29, 1845, provided:

> "The Legislature shall also adopt such measures as may be required to cede to the United States, at the proper time, all public edifices, fortifications, barracks, ports, harbors, navy and navy yards, docks, magazines, arms and armaments, and all other property and means pertaining to the public defence now belonging to the Republic of Texas. . . ."[11]

On March 26, 1846, the legislature of the State of Texas passed an act

> "Authorizing the Governor of the State of Texas to cede and transfer to the United States all of the property of what description soever embraced in and contemplated by the joint resolution of both Houses of the Congress of the United States, approved 1st of March, 1845, and the 8th section of the 13th article of the Constitution of the State of Texas."

The provisions of this Act are as follows:

> "Section 1. Be it enacted by the Legislature of the State of Texas, That the Governor thereof be, and hereby is, authorized and fully empowered to cede, transfer and deliver over to the United States, or any agent or agents by them appointed, by such instrument, in writing or other means, as he may deem proper and necessary, all the public edifices, fortifications, barracks, ports and harbors, navy and navy yards,

[11] 2 Gammel's Laws of Texas 1300-1301.

docks, magazines, arms and armaments, and all other property and means, pertaining to the public defence, belonging formerly to the Republic, now the State, of Texas."[15]

In a letter transmitting a copy of this act to President Polk, Governor Henderson said:

> "I have the honor herewith to transmit to you a copy of an act passed by the Legislature of the State of Texas authorizing the Executive *to transfer* to the United States, in pursuance of the provisions of the Joint Resolutions of the United States Congress under which Texas has been annexed, all the public edifices and other public property pertaining to the public defence and also a copy of an act authorizing the Executives of the State to transfer to the United States all custom houses & other public buildings belonging to the State and use by the officers of the Republic in the collection of customs, upon such terms as may be agreed upon. *I am ready on the part of the State to carry out the objects of the two acts referred to and beg to be informed what manner you propose to receive the property embraced* in the said Joint Resolution and whether the Government of the United States wishes to obtain the property embraced in the last Act referred to above. . . ."[16]

Officials of the United States government adopted without question the same interpretation accorded by Texas officials to the clause in the Joint Resolu-

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[15] Acts, 1st Leg., 1846, 23; 2 Gammel's Laws of Texas 1331-1332.

[16] Henderson to Polk, April 4, 1846, Miscellaneous Letters, April-June, 1846, MS National Archives.

tion providing for the cession of property by the State of Texas to the United States. Shortly after the annexation of Texas, Secretary of State Buchanan requested an appropriation to provide funds for a commissioner of the executive department to go to Texas

> "to receive this property, and take care that it *shall be* properly ceded to the United States, according to the spirit and terms of the Joint Resolution for annexing Texas to the Union."[17]

Such a bill was introduced and passed in the House of Representatives on February 4, 1846. This Act provided:

> "That the sum of three thousand dollars is hereby appropriated, . . . for the purpose of the defraying any expenses which may be incurred in obtaining from the State of Texas the cession of the public properties specified in the second section of the joint resolution for annexing Texas to the United States, and in the eighth section of the thirteenth article of the constitution of that State, in receiving the transfer of the same, and placing it in the custody of the appropriate agents of the Treasury, War, and Navy Departments, respectively."[18]

When this bill reached the Senate, the following amendment was offered:

> "That, whenever the President of the United States shall receive official information that the the State of Texas is ready *to cede* to the United

[17] Buchanan to McKay (Chairman of Committee of Ways and Means), Feb. 3, 1846, R. G. 59, General Letters of the Dept. of State, Domestic Letters, 35 MS National Archives.

[18] Cong. Globe, 29th Cong., 1st Sess., 308-310.

States the public property lately belonging to the republic of Texas, and which by the terms of the joint resolution for the annexation of that republic to the Union, and by the thirteenth article and eighth section of the constitution of Texas, is *to be ceded* and surrendered to the United States, he be, and hereby is, authorized to cause a suitable officer of the army of the United States, not under the rank of captain, to receive from the proper authorities of Texas possession of all the fortifications, barracks, magazines, arms and armaments, and ordnance of every description, pertaining to the military arm of public defence; and in like manner to cause a suitable officer of the navy of the United States, not below the rank of commander, to receive from the proper authorities of said State of Texas all the ships and vessels of war, navy-yards and dock-yards, ports and harbors, arms, armaments, and ordnance, *pertaining to the naval arm of the public defence;* and that he, in like manner, cause the officers of the customs of the United States in Texas to receive from said authorities all the custom-houses, and other places and property for the collection of the revenue, which, by said joint resolution, are *to be ceded* and surrendered to the United States.

"Sec. 2. And be it further enacted, That the President cause an exact inventory of all the property, of every description, so ceded and surrendered, to be laid before Congress as early after the said service is complete as is practicable.

"Sec. 3. And be it further enacted, That it shall be the duty of the Attorney General of the United States to examine into the title of the property so ceded and surrendered, and to pre-

scribe such forms of grant and conveyance as may be requisite to vest a good title thereto in the United States."[19]

Further evidence on this subject relates to actual cessions of property which occurred after, and only after, annexation. This evidence is contained in county deed records, records of the General Land Office of Texas, the National Archives, State Archives and similar places.

### PORTS, HARBORS, AND DEFENSE

One of plaintiff's most distorted factual conclusions is contained in its assertion that the parties intended that all of Texas' ports and harbors were to be ceded to the United States (plaintiff's brief, p. 2), and that they—"contiguous to, and merging with, the marginal sea—were to pass to the United States because of their importance to the national security." (p. 13.)

In the first place, the above Senate amendment prepared by executive officials shows that only ports and harbors then connected with, and forming part of, navy installations were intended to be ceded. Our evidence will show they were the harbors and slips connected with the navy yards and forts, *then used* by the Republic in the public defense. No other ports, harbors, waters, or submerged lands were intended to pass. This is shown by the interpretation in the Senate amendment quoted above, which calls for "ports and harbors, arms, armaments, and ordnance, *pertaining to the naval arm of public defence.*"

[19] H. R. 180, Records of 29th Cong., 1st Sess., MS, National Archives.

Equally important, we can show that representatives of the United States were appointed to inventory and receive the property intended to be ceded. We have the inventories, and they do not cover any of the land in controversy or any ports or harbors except those attached to and a part of 1845 defense installations.

There are two letters which illustrate the nature of a vast amount of evidence which will show that all property to be ceded by Texas to the United State was listed and ceded after annexation and that no other property was asked for or intended to be covered by the agreement.

The following letter was addressed to H. G. Cook by Governor Henderson of Texas:

> "You will confer a favor upon the Executive by making out and handing to him a list of the public property which is still under your charge as Secretary of War & Marines of the Republic of Texas and also a description of its condition & location. Confining the same to the description of property contained in the Joint Resolution of the U. S. Congress under which Texas has been annexed to the United States."[21]

Similarly, Col. H. G. Runnels, the United States collector of customs of Galveston, wrote Secretary of the Treasury Walker in Washington:

> "Soon after the receipt of your letter of the 25th of March instructing me as agent for the U. S. to receive and receipt for all public prop-

[21] Henderson to Cook, April 20, 1848, Governor's Collection, MS, State of Texas Archives.

erty to be transferred by the State of Texas, to the United States, I proceeded to Austin for the purpose of complying with your instructions, and have as far as practicable done so. I have the honor herewith to transmit, duplicate lists of such property as has been transferred to me —the property at the Austin Arsenal described in the inventory marked A. I left in possession of Mayor Beall of the United States Army as per his receipt.

"The property at the Houston Arsenal described in Inventory marked B. I left in possession of B. O. Bayne, Captain of Texian Ordnances, it being the best that I could do for the presentation of the property until other disposition be made. The Navy and Naval property described in Inventory C, I have left in charge of Lieutenant W. A. Tennison of whom I received it, until other disposition be made.

"Lieutenant C. P. Kingsbury of the Ordnance Corps, has been instructed by the Secretary of War, to receive from me and receipt for all the military property that I may hand over to him."[22]

These inventories and other evidence show that only property of the same nature and type as that specially set forth which was owned by, *and devoted to the public defense* of, the Republic of Texas at the time of annexation was to be ceded and that it was not intended that any other property be ceded.

From this will follow that property later declared to pertain to the public defense would not come with-

[22] Runnels to Walker, May 15, 1846, Records of the Dept. of the Navy, Naval Records Collection of the Office of Naval Records and Library, Miscellaneous Letters Received, July, 1846, MS, National Archives.

in the cession to be made. As said by the Court in *Strother v. Lucas*, 12 Pet. 410, 438, 446 (1838):

> "The terms of a treaty are to be applied to the state of things *then existing*."
> "The United States must remain content with that which ~~contended~~ contented them at the transfer."

(3) *Mines and Minerals were clearly excluded from the cession.*

The separate ownership by the Republic of Texas of mines and minerals[23] was recognized by the United States in the unratified treaty for annexation, which provided for the cession by Texas of all its territory to the United States, "including vacant lands, mines, minerals," etc. Mines and minerals were thus enumerated separately from lands. In practically all of the many drafts of the Joint Resolution by the United States Congress, "mines and minerals" were again enumerated for cession to the United States. However, the phrase "mines and minerals" was stricken from the resolution before final passage in the House, and its omission was specifically noted with apparent approval in the Senate.[24] From this it

[23] See discussion of this separate ownership on p. 112-124, *supra*.

[24] The drafts of the joint resolution providing for the cession of "mines and minerals" to the United States are found in the Cong. Globe, 28th Cong., 2d Sess., on the following pages: (1) Resolution by Mr. Ingersoll (p. 26); resolution by Mr. Douglass (p. 65); resolution by Mr. Tibbetts (p. 76); amendments of Mr. Douglas (p. 85); resolution by Mr. Brown (p. 129); resolution by Mr. Burke (p. 140). Mr. Brown on January 13, 1845, introduced a resolution which was identical to his resolution which was finally adopted, except that the wording "all mines, minerals, salt lakes and

is clear that they were not to be ceded to the United States, but were to be retained by the State.

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springs" was included in the list of enumerated properties to be ceded by Texas to the United States (Cong. Globe, 28th Cong., 2d Sess. 129). These words were eliminated in the substitute draft offered by Mr. Brown and adopted on January 28, 1845 (Cong. Globe, 28th Cong, 2d Sess. 193).

The action on the floor of the House was as follows: Mr. Ingersoll had offered a "joint resolution for annexing Texas to the United States." Article I, providing for cession of properties to the United States, contained these words:

> "This cession including all public lots and squares, vacant lands, *mines, minerals, salt lakes and springs.* . . ." (Cong. Globe, 28th Cong., 2d Sess. 191-92.)

Several substitutes were offered and rejected, the last being that of Mr. Burke. It was substantially the same as the substitute next offered by Mr. Brown and finally adopted, except that its provision for cession of property to the United States also included the "mines, minerals, salt lakes, and springs." (Cong. Globe, 28th Cong., 2d Sess. 192-93.)

Immediately after Mr. Burke's substitute was defeated, Mr. Brown offered his substitute, which was substantially the same as the defeated Burke resolution except that the provision for cession of property to the United States eliminated the words "mines, minerals, salt lakes and springs," and it was adopted.

The omission of "mines and minerals" was specifically noted when the House resolution was pending in the Senate, as evidenced by the following excerpts from the Senate debate reported in the Appendix to the Cong. Globe, 28th Cong., 2d Sess. 389:

> "Mr. Dayton. But, sir, I desire now to submit a few remarks in reference to the other sections of this resolution. The second session provides for the cession to the United States of all the 'mines, minerals,' etc. . . ."
>
> (Mr. Walker here rose and said he thought that it had been finally stricken out in the House. He at length found the resolution as amended, which did not contain it.)
>
> "Mr. Dayton. I am glad it is so, though I was not aware of it. I used the printed resolution I found on my table and was not aware that its provisions had been altered."

(4) *Retention of "vacant and unappropriated lands within its limits" confirms the construction that lands and minerals in controversy were not intended to be ceded, but were actually retained by the State.*

It was agreed, one hundred and five years ago, that Texas, when admitted into the Union, ". . . shall also retain all the vacant and unappropriated lands lying within its limits. . . ." (Second Provision, Joint Resolution, Appendix p. 59.) Plaintiff treats this provision as a reservation and attempts to apply a narrow and limited interpretation to its words. (plaintiff's brief, p. 13.)

The provision is not a reservation, but an express retention. It is therefore not to be construed strictly, as in derogation of a grant, but broadly to accomplish the intent of the parties. Plaintiff admits that the language is subject to more than one construction. Plaintiff's brief sets forth various evidentiary matters to support its interpretation that the terms were not intended by the parties to cover the submerged lands in controversy. (plaintiff's brief, pp. 22-25, 65-67.) No doubt plaintiff would have been contending for the broad and plain meaning of the term if "vacant and unappropriated lands" had been ceded by Texas to the United States, rather than retained by Texas, for that is exactly the position which plaintiff took in respect to the words "public lands" in *United States v. California.*

The argument of the United States in the *California* case with respect to "public lands" was di-

rectly opposed its present argument.[25] Against California, it contended that the marginal sea was reserved to the United States by the provision in the admission act that the State

> "shall not interfere with the primary disposal of the public lands within its limits."

Attorney General Clark urged that

> "Congress expressed an intent, and, in effect, provided that the title to all such lands be reserved to the United States."

Referring to the same cases cited on page 31 of their brief in this case,[26] the United States said that "prior decisions with respect to general legislation involving the disposition of 'public lands' appear to hold that the term 'public lands' does not include tidelands." However, it was argued by the United States that

> "There are no decisions of this Court extending that interpretation to the statutory provision here involved as applied to the three-mile belt, and it may be doubted whether such extension should be made since the rule of those decisions does not appear to have any support in the legislative history of the foregoing statutory provision."

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[25] Brief of the United States in Support of Motion for Judgment, *United States v. California*, No. 12, Original, October Term, 1946, pp. 61-63.

[26] *Borax, Lt'd. v. Los Angeles*, 296 U.S. 10, 17; *Mann v. Tacoma Land Co.*, 153 U.S. 273, 284; *Newhall v. Sanger*, 92 U.S. 761-763.

To aid in distinguishing the phrase as used in the Admission Act from its use in statutes for disposal of public lands to private persons, the United States went into the circumstances of admission saying that

> "such meager materials as are available with respect to the 1850 Act admitting California seem to point to the contrary conclusion."

In discussing the evidence that seemed to point to such "contrary conclusion," the Government referred to the bill which became the Act of Admission and to the report of the committee on that bill, wherein it was said that "the right of the United States to the public domain and *other public property in California*" was to be left "incontestable." (Italics supplied by the United States.) From this, the Government concluded that:

> "'Thus the report speaks of public domain and *other* public property, a descriptive term so sweeping as to include submerged lands owned by the United States." (Italics theirs.)

Against Texas, admitted into the Union only five years before California, the United States now says that

> ". . . the phrase 'vacant and unappropriated lands' was regarded as the equivalent of the more usual term 'public lands,' and this Court and the Texas courts have long held that the latter term normally does not include tidelands

> or submerged lands, but only fast land subject to disposition or sale under the general land laws,"[27]

and that

> ". . . it is highly unlikely that the simple reservation of 'vacant and unappropriated lands' was designed to cover the significant area now in dispute."[28]

When, as in California, the reservation of "public lands" was in favor of the United States, plaintiff urged this Court to rule that the term was "so sweeping as to *include* submerged lands." The Government now argues that the term "vacant and unappropriated lands," which it says is the equivalent of "public lands," does *not include* submerged lands.

The cases cited by plaintiff for the principle that the term "public lands"[29] does not include submerged lands clearly are not applicable to the present case. They merely embody the principle that the words "public lands" are strictly construed when used in general statutes authorizing grants or sales to individuals for private purposes. The power of Texas to make grants or sales of public lands, though submerged, has been upheld since the days of the Republic, and has many times been exercised. The rule of the cases cited by plaintiff has no application to direct legislative grants, treaties and other similar agreements by a State acting as a sovereign.

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[27] Brief of the United States, p. 12.
[28] *Id.* at 13.
[29] Brief of the United States, p. 31.

In agreements of this type the parties "are free to employ words in any sense they choose." Jessup, *A Modern Law of Nations* (1948) 138.

In *The Bello Corrunes*, 6 Wheat. 152, 171-172 (1821), the Court said that

> "This court would not readily lean to favor a restricted construction of language, as applied to the provisions of a treaty, which always combines the characteristics of a contract as well as a law."

For this reason, these agreements "are to receive a fair and liberal interpretation according to the intention of the contracting parties." 1 Kent, *Commentaries on American Law* (1826) 174; *Valentine v. United States*, 299 U.S. 5, 10 (1936); *Bacardi v. Domenech*, 311 U. S. 150, 163 (1940); *Todok v. Union State Bank*, 281 U.S. 449, 452 (1930); *Asakura v. Seattle*, 256 U.S. 332, 342 (1924); *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1880); *Chew-Heong v. United States*, 112 U.S. 536, 539 (1884); *Shanks v. Dupont*, 3 Pet. 242, 249 (1830).

The intention of the parties is to be determined "in the light of the conditions and circumstances existing at the time" the agreement was "entered into, with a view to effecting the objects and purposes of the States thereby contracting." *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912); *Ross v. McIntyre*, 140 U. S. 453 (1891).

Even without the aid of the rule of liberal construction, the term "vacant and unappropriated" lands, as understood in 1845, was broad enough to include submerged lands.

*Mobile v. Eslava*, 16 Pet. 234 (1842), involved the title to certain submerged lands in Mobile Bay. The new state of Alabama had been erected out of grants of "waste and unappropriated" lands made by several of the old states. Plaintiff argued that "by the compact between the United States and Alabama, on her admission into the Union, it was agreed that the people of Alabama forever disclaimed all right or title to waste and unappropriated lands lying within the State. . . ." Mr. Justice Catron there said that the term

> "waste and unappropriated lands . . . embraces lands under water as emphatically as those not covered with water. . . ." 16 Pet. at 254.

*Pollard v. Hagan*, 3 How. 212 (1845), also involved submerged lands in Mobile Bay. The Court, in discussing the right of the United States to these lands, said that

> "This right originated in voluntary surrenders, made by several of the old States of their *waste and unappropriated* lands to the United States. . . ." 3 How. at 224.

The case of *Attorney General v. Chambers*, 4 De G. M. & G. 486 (1854), involved the limit of Crown ownership of submerged lands, which was decided only eight years after the annexation of Texas. Lord Chancellor Cranworth used the expression "unappropriated soil" to refer to land below the sea. His observation is quoted by Mr. Chief Justice Hughes in the tidelands case, *Borax, Lt'd. v. Los Angeles*,

296 U.S. 10, 25 (1935). See also *Costas v. Phillipine Islands*, 221 U.S. 623 (1910) wherein this Court referred to submerged land of Manila Bay as "public land," and distinguished the property interest therein from sovereignty.

More recent cases show that the term "public "land" or "lands" frequently includes submerged lands. For example, in *Hymes v. Grimes Packing Co.*, 337 U.S. 86 (1949), the Court held that "public lands" as used in a statute authorizing the Secretary of the Interior to designate as an Indian reservation any area of land which had been reserved for use and occupancy of Indians or Eskimos by prior statute, together with additional "public lands" adjacent thereto within the territory of Alaska, or any other "public lands" actually occupied by Indians or Eskimos, did not refer only to land above low tide, but could be interpreted to include coastal waters.

"The body of lands known as Annette Islands" was held to include surrounding waters as well as the upland in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). In reaching this conclusion, the Court considered the circumstances under which the reservation was created and the fact that the statute had been always treated as reserving the adjacent fishing grounds as well as the upland.

Plaintiff does not undertake to examine the legal meaning in 1845 of the expression "all of the vacant and unappropriated lands lying within its limits." It urges, however, on the basis of intention, that the marginal sea "is not within the class of 'vacant and unappropriated lands,'" because (1) the sole pur-

pose of the reservation was to give Texas the means to pay off its debt and (2) the expression "vacant and unappropriated lands" is equivalent to "public lands," which were not subject to sale to pay the debt.

Under the first point, the Government states (plaintiff's brief, p. 23): "The lands contemplated were obviously those which were suitable for sale and disposal for sums which would reduce the Republic's debt. . . ." This statement is not convincing; indeed, it is not even persuasive. The purpose of the Annexation Agreement was not to provide Texas with "the means of liquidating the Republic's liabilities" (p. 29), since Texas already owned the means in question; on the contrary, the intent of the Agreement was that, since the United States refused to assume the liabilities of the Republic, it should have no claim to Texas' assets, excepting only the defense properties expressly ceded. Indicative of the distinction is the fact that the State was to keep not only the vacant and unappropriated lands, to be applied to the payment of its public debt, but also "the residue of said lands, . . . to be disposed of as said State may direct." The latter provision is obviously incompatible with the idea that the sole purpose of the retention was to enable the State to discharge its debt. Actually the suitability of the lands for sale was of no concern to the parties. All the Texas lands had been branded the year before as "worthless" in the United States Senate, and that body refused to take them in exchange for assumption of the Texas debt. Also, the Government's argument would fail because the lands were and have been subject to appropriation and sale. Our evidence

will show that persons in Texas considered the submerged lands of the Gulf as valuable as some of the West Texas uplands prior to 1845.

The Government's argument that vacant and unappropriated lands were considered the equivalent of public lands and thus are confined to lands above ordinary high tide, likewise finds no support. The Government cites absolutely no basis for its conclusion.[30]

Although the sedentary fisheries represented one of the earliest uses made of the seabed and subsoil, defendan's evidence will show knowledge and use of petroleum along the Texas and Mexico coasts and many other uses of the lands and minerals prior to 1845. This evidence can be confirmed by the testimony of aged witnesses who in later years saw, and scientifically tested, petroleum at the very places where it had earlier been described by historians. Defendant's motion to take the oral depositions of these witnesses in order to preserve their testimony is still pending before this Court.

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[30] The Government's point (page 33) that the State Land Commissioner in certain reports on the State's public domain did not include lands under the Gulf until recent years is, of course, of no consequence. It is completely irrelevant upon the question of intention of the parties. Since the State General Land Office was not authorized to sell or lease submerged land until comparatively recent years, it is natural that such lands should not be included within the tabulation. (Previously they were sold or leased only by direct legislative acts.) If this is a proper indication of intention or non-ownership, then plaintiff is immediately foreclosed, because the evidence will show that the United States has never in 105 years listed the land in question as part of the nation's public domain.

Defendant has additional cases and evidence which it will offer on this point on the merits. Enough has been said to show beyond dispute that the term "vacant and unappropriated" land could have been used by the parties to mean exactly what it says, thereby applying to all lands "lying within its limits." Plaintiff has made a fact issue of the intention of the parties in their use of the term, and defendant is entitled to develop the evidence fully on this and other fact issues in the case.

Also, contrary to the impression sought to be left by the United States, the title of Texas to the lands and minerals within three leagues of its coast does not rest solely on the meaning of "vacant and unappropriated lands." Texas did not convey its territory to the United States, with a reservation, but on the contrary, like the United States in the *California* case, Texas is the sovereign of the soil within her boundaries and the United States obtained only those property rights transferred to it by the State of Texas. As already shown, the only cessions agreed to be made by the Republic after its admission as a State did not include the lands and minerals within the three-league belt. There being no grant of these lands and minerals to the United States, the State of Texas retained them.

(5) *The "defence," "equal footing," "boundary adjustment," "proper territory," and national sovereignty provisions, referring only to governmental powers, show no intention of enlarging the cession of property to be made to the United States.*

Plaintiff does not contend that these provisions in the Annexation Agreement amounted to a transfer of property rights as a matter of law, or that they are inseparable from the governmental powers mentioned. It refers to them only as indicative of the intention of the parties to include the controverted lands and minerals in the cessions to be made to the United States, or at least to restrict the State's retention of "lands lying within its limits" to uplands. Point II D (pp. 65-68) of the Government's brief is directed wholly to interpreting the Annexation Agreement. Point II B (pp. 52-63) likewise is based on the intention of the parties to the agreement, since plaintiff assumes in its argument on succession and sovereignty that the lands and minerals in question were not retained by the State as "vacant and unappropriated lands." (See notes 28 and 29, p. 54, plaintiff's brief.) In other words, plaintiff admits that if Texas retained these lands and minerals upon annexation, succession and sovereignty do not affect the present status of ownership by the State.

### THE "DEFENSE" CLAUSE

As already shown, the agreement by Texas to cede "to the United States, all public edifices, fortifications, barracks, ports and harbors, navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to the Republic of Texas" was not a cession to the United States of the lands and minerals under the marginal sea. See discussion, *supra*, pp.

143. Instead of supporting an interpretation against retention of the lands under the Annexation Agreement, it strengthens the contrary view. All properties intended to pass for defense purposes were later inventoried for deeds of cession, titles approved by the Attorney General, and the whole transaction closed, as will be shown by the evidence of which plaintiff is apparently unaware.

THE "EQUAL FOOTING" CLAUSE

In the *California* case, the Attorney General of the United States contended that

> ". . . the equal footing rule is inapplicable because the concept of ownership as an attribute of sovereignty within the meaning of the equal footing clause is unsound and should not be extended to the marginal sea."[31]

Attorney General Clark, in his article "National Sovereignty and Dominion Over Land Underlying the Ocean," wrote:

> "As has been indicated, the powers and rights so reserved to the original States, and vested in the subsequently admitted states under the 'equal footing' clause, are political and not proprietary in character."[32]

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[31] Brief for the United States in Support of Motion for Judgment, *United States v. California*, No. 12, Original, Oct. Term, 1946, p. 143.

[32] 27 Tex. Law Rev. 140, 150 (1948).

The Solicitor General now contends, not as a matter of law, but as an indication of intention of the parties to the Agreement, that

> ". . . since the original states have never owned the marginal belt, Texas cannot do so and remain on an 'equal footing.' . . ."[33]

The Solicitor General says that "The 'equal footing' clause . . . is the classic expression of the constitutional equality of all states."[34] This is so. But it is obvious that all states cannot be made physically equal. However this Court rules, the inland states will have no seacoast, nor will Texas have New York Harbor or the bed of Lake Michigan.

The rule of equality refers to political rights, not property rights. As said in *Stearns v. Minnesota*, 179 U.S. 223, 244-245 (1900):

> "It has often been said that a state admitted into the Union enters therein in full equality with all the others and such equality may forbid any agreement or compact limiting or qualifying political rights or obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of status, but only of the power of a state to deal with the nation or with any other state in reference to such property. The case before us is one involving simply an agreement as to property between a state and the nation.
>
> "That a state and the nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions

[33] Brief for the United States, p. 66.
[34] Brief for the United States, p. 61.

of this Court, and that they have been frequently made in the admission of new states, as well as subsequently thereto, is a matter of history. . . ."

It is indeed a matter of history that the original colonies were not equal in property;[35] that the original states were not "equal";[36] that the cessions by such states were not equal, but subject to many different reservations and exceptions;[37] and that the states subsequently admitted were not "equal" as to property.[38]

The original states were sovereigns of the soil within their boundaries. The states created out of ceded territory were not. As this Court said of the new state of Illinois, "She surely cannot claim a right

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[35] See *Johnson and Graham's Lessee v. McIntosh*, 8 Wheat. 543, 579 (1823).

[36] See Story, *Commentaries on the Constitution* (5th ed. 1891), 166.

[37] Donaldson, *The Public Domain*, 82-86.

[38] Vermont, March 4, 1791, was a sovereign of the soil by purchase from New York. Donaldson, *The Public Domain*, pp. 42-420. Kentucky, June 1, 1792, was largely under Virginia law. *Green v. Biddle*, 8 Wheat. 1 (1823). Tennessee, June 1, 1796, was largely reserved by North Carolina. *Id.* at 77, 78, 83. Ohio, November 29, 1802, was subject to reservations by Virginia, *id.* at 68, 69, and the remainder was disposed of by the United States. The public domain in the other states admitted prior to Texas was disposed of by the United States, except for Maine, which was sovereign of her soil. *Id.* at 38. These states were Louisiana (1812), Indiana (1816), Mississippi (1817), Illinois (1818), Alabama (1819), Maine (1820), Missouri (1821), Arkansas (1836), Michigan (1837), and Florida (1845). All were "admitted into the Union on an equal footing with the original States in all respects whatever." Collected in Thorpe, *The Federal and State Constitutions* (1909).

to the public lands within her limits."[39] New states were admitted so as to "participate in political power . . ." and ". . . share in the government."[40] The power of Congress in admission acts to make conditions and terms as to rights of property was conceded, while the power to control political rights was denied.[41]

Indeed, in the case cited by plaintiff, *Coyle v. Smith*, 221 U.S. 559 (1910), the Court distinguished *Beecher v. Wetherby*, 95 U.S. 517 (1877), and *Minnesota v. Bachelder*, 1 Wall. 109 (1864), on the ground that both involved the power of Congress to regulate the disposition of public lands, saying that

> "Minnesota v. Bachelder . . . is another case which involved nothing more than an exertion by Congress of its power to regulate the disposition of public lands." (578.)

The "equal footing" clause, as used in the various enabling acts, has never been held to convey any

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[39] *United States v. Gratiot*, 14 Pet. 526, 538 (1840).

[40] *American Insurance Company v. Canter*, 1 Pet. 511, 542 (1828).

[41] *Permoli v. First Municipality*, 3 How. 589 (1844); *Cooper v. Roberts*, 18 How. 173 (1855); *The Kansas Indians*, 5 Wall. 737 (1866); *Withers v. Buckley*, 20 How. 84 (1857); *Gibson v. Chouteau*, 13 Wall. 92 (1871); *United States v. 42 Gallons of Whiskey*, 93 U.S. 188 (1876); *United States v. McBratney*, 104 U.S. 621 (1881); *Escanaba Co. v. Chicago*, 107 U.S. 678 (1882); *Cardwell v. American Bridge Co.*, 113 U.S. 205 (1884); *Fort Leavenworth Railroad Co. v. Lowe*, 114 U.S. 525 (1885); *Huse v Glover*, 119 U.S. 543 (1886); *Williamette Iron Bridge Co. v. Hatch*, 126 U.S. 1 (1888); *Ward v. Race Horse*, 163 U.S. 504 (1895); *Dick v. United States*, 208 U.S. 340 (1908); *Alabama v. Schmidt*, 232 U.S. 168 (1914); *McCabe v. A. T. & S. F. Ry.*, 235 U.S. 151 (1914); *Hawkins v. Bleakly*, 243 U.S. 210 (1916).

property or control of lands to the United States. Instead, it is plain that the clause is intended for the benefit of new states, and, on well-settled principles of construction, if such clause is effective for any purpose, it is to create rights in such states, not to transfer property to the United States. This is true even as to the property of a territory. As said in *Brown v. Grant*, 116 U.S. 207, 212 (1886):

> "Unless otherwise declared by Congress, the title to every species of property owned by a Territory passes to the State upon its admission into the Union."

In *Case v. Loftus*, 39 Fed. 730 (C.C. Ore., 1889), the Court said:

> "The doctrine that new states must be admitted into the Union on an 'equal footing' with the old ones does not rest on any express provision of the constitution, which simply declares (Article 4, Sec. 3) 'new states may be admitted by congress into this Union,' but on what is considered to be and has been held by the Supreme Court to be the general character and purpose of the union of the states, as established by the constitution,—a union of political equals. . . .
>
> "But certainly this equality does not require that the new state shall be admitted to any right in the soil thereof considered as property. The ante-Revolution states acquired no property in the soil thereof by entering into the Union. The lands that had not passed into private hands they already owned and held as the political successors of the British crown.
>
> "The true constitutional equality between the states only extends to the right of each, under the constitution, to have and enjoy the same

measure of local or self government, and to be admitted to an equal participation in the maintenance, administration and conduct of the common or national government."

The plaintiff's contention is an inversion of the doctrine of *Pollard's Lessee v. Hagan*, 3 How. 212 (1844), which plaintiff says is an "unsound doctrine."[45] It is not clear whether plaintiff is asserting the rule of the *Pollard* case or is attacking such rule, as in the *California* case. In either event, the *Pollard* rule has no application to Texas, which has owned since independence the beds of all navigable waters within its boundaries.[46] Texas' right to define its waters as navigable has never been disputed by the United States. The United States has not asserted, and does not here assert, any title under the "equal footing" doctrine to the non-navigable streams and lakes in Texas.[47] The cases relied on by plaintiff in its brief (p. 63) have no application to any of the waters within the boundaries of Texas, Texas never having been a territory.

Nor does the "equal footing" doctrine apply to state boundaries. Louisiana, Mississippi, and Alabama, fronting the Gulf of Mexico, were admitted "on an equal footing." Louisiana's boundary included "all islands within three leagues of the coast."[48]

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[45] Brief for United States, p. 42, note 21.

[46] *Heard v. Town of Refugio*, 129 Tex. 349, 103 S. W. (2d) 728 (1937).

[47] Compare *United States v. Oregon*, 295 U.S. 1 (1935) with *State v. Bryan*, 210 S. W. 2d 455 (Tex. Civ. App., (1948), writ ref., n.r.e.).

[48] Thorpe, *op. cit.*, Vol. 3, 1376.

The Mississippi and Alabama boundaries included "all islands within six leagues of the shore."[49]

The inapplicability of plaintiff's argument to the water boundaries of Texas is shown by the case of *Oklahoma v. Texas*,[50] to which the United States was a party. There the Court held that the south half of the bed of the Red River belonged to the United States, not Texas, because the area north of the south bank

> ". . . constitutes no part of the territory properly included within or rightfully belonging to Texas at the time of the admission of that state into the Union, and was not within the limits nor under the jurisdiction of that state. . . ."[51]

Actually, plaintiff's suggestion that the "equal footing" and "sovereignty" clauses be used as an aid to interpret what property the parties intended for Texas to retain, is fatal to its case. The State has an abundance of evidence from Congressional Records which show conclusively that in 1845 the members of both the United States and Texas Congresses *then believed* that new States would own all lands beneath navigable waters within their boundaries, inland and coastal, even without express grant or

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[49] Thorpe, *op. cit.*, Vol. 1, 89-92.

[50] 258 U.S. 574, cited p. 63 of Brief for the United States. The Court followed 256 U.S. 70 and *United States v. Texas*, 162 U.S. 1.

[51] 256 U.S. 70, 83; 258 U.S. at 579. See also *United States v. Texas*, 162 U.S. 1 (1896); *Oklahoma v. Texas*, 272 U.S. 2, 25, 49 (1926); and *New Mexico v. Texas*, 275 U.S. 279 (1927); all of which adjudicated Texas' boundaries in accordance with their existence at the time of annexation rather than on "equal footing" principles.

retention, under the then existing concept of State sovereignty and the "equal footing" doctrine.[52] It is elemental that the 1845 belief of the parties as to the meaning of the clauses as applied to submerged land is the understanding which should be applied now in interpreting what they intended. It should be remembered that several State court decisions and two Supreme Court decisions had previously stated Congress' 1845 belief as the law. As early as 1842 in *Martin v. Waddell* (16 Pet. 367, 410), it was said:

> ". . . when the revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

The rule had been announced again by the Supreme Court in 1844 in the case of *Pollard v. Hagan* (3 How. 212, 229), as follows:

> "First. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. Second. The new States have the same rights, sovereignty, and jurisdiction over this subject as the Original States."

[52] A majority of the members of Congress in 1946 and 1948 expressed the same understanding. See the wording of H. J. Res. 225, 79th Cong., 2d Sess. (1946); 92 Cong. Rec. 9642, 10316 (1946) confirming titles to the States, which was vetoed by the President. 92 Cong. Rec. 10660 (1946). Also see S. 1545, 81st Cong., authored by 31 Senators for the same purpose and containing the same interpretation; and H. R. 5992, 80th Cong., which passed the House by a vote of 257 to 29. 94 Cong. Rec. 5155 (1948).

The understanding and belief as to the law on this subject in 1845 is forcibly shown by the following language of this Court in the *California* case (332 U. S. at 36).

> "As previously stated this Court has followed and reasserted the *basic doctrine of the Pollard case* many times. And in doing so it has used language strong enough to indicate that the Court *then believed that States* not only owned tidelands and soil under navigable inland waters, but also *owned soils under all navigable waters within their territorial jurisdiction, whether inland or not.*"

Obviously, the effect of the use of the term "equal footing" and all terms relating to defense, sovereignty, and retention of lands by the State, should be determined in the light of what the parties believed the law to be at the time. When that is done, it will be clear that the parties intended the retention of lands by the State to be as broad as it was written on the face of the document—covering all lands[53] "lying within its limits."

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[53] Blackstone, in describing what is meant by "lands," said: "For *land*, says Sir Edward Coke, comprehendeth, in its legal signification, any ground, sod, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. . . . It is observable that water is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law; and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of water only . . . but I must bring my action for the land that lies at the bottom. . . . So that the word 'land' includes not only the face of the earth, but everything under it, or over it. And therefore, if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods,

It would take every acre of the lands and minerals here involved within Texas' three-league boundary to offset the inequity which would result from a different interpretation of the agreement at this late date. For instance, to the States which did not retain their lands, Congress has made large land grants within their boundaries for public education. The list includes:[54]

| | | |
|---|---|---|
| Arizona | 8,093,156 | acres |
| California | 5,534,293 | " |
| Colorado | 3,685,618 | " |
| Montana | 5,198,258 | " |
| New Mexico | 8,711,324 | " |
| Oregon | 3,399,360 | " |
| Utah | 5,844,196 | " |
| Wyoming | 3,470,009 | " |
| Texas | NONE | |

As shown above, plaintiff is asking this Court to place an interpretation on the Agreement which is at variance with the intent of the Congress of 1845 and the interpretation of subsequent Congresses. The total acreage within the three-league belt here involved is 2,608,774 acres, an amount less than any

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his waters, and his houses, as well as his fields and meadows. . . . the capital distinction is this, that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of the land, which is *nomen generalissimum:* everything terrestrial will pass." 2 Bl. Comm. 17-19. Blackstone's definition of land was still accepted in the edition of Kent's *Commentaries on American Law* annotated by Oliver Wendell Holmes, Jr., in 1884. 3 Kent's Comm. 401.

[54] *Statistical Abstract of the United States* (1948 ed.), Table No. 188.

of the above listed States received for school purposes. The Texas mineral estate in these lands is vested wholly in its Permanent School Fund. Shall it be decreed to the United States under a new interpretation so that the State can be put on "equal footing" by receiving a return grant of the same property for school purposes, or shall it be left with the public school fund under the same interpretation that has made it unnecessary and impossible for Congress to grant Texas lands within its borders as it has within the borders of other States?

The answer will be simple when the Court has heard all the evidence which can be produced showing that the parties never understood any provision of the Agreement to restrict Texas's retention of lands by eliminating the type of submerged lands which they *then believed* to belong to all the States.

### THE "BOUNDARY ADJUSTMENT" CLAUSE

Plaintiff seeks to obtain some benefit to its interpretation of the Annexation Agreement from the clause providing for "the adjustment" by the United States of boundary questions "that may arise with other governments." As shown by the boundary discussion, the only "other government" with which there was any dispute as to the extent of the boundaries of the Republic of Texas was Mexico, and President Polk had specifically agreed to maintain the boundary claimed by Texas even if it meant war with Mexico.[55] That the purpose of this provision related only to the boundary between Texas and

[55] *Supra*. p. 83.

Mexico is shown by the debates in Congress on the compromise of 1850. Mr. Butler, of South Carolina, said that Texas

> "delegated to the Federal Government no more power than to settle that boundary [the Rio Grande] between her and Mexico."[56]

Mr. McLean, of Kentucky, said:

> "This question of boundary was a dispute between Texas and Mexico. The United States became the agent of Texas, with full authority to settle this dispute. . . ."[57]

Mr. Volney E. Howard, a member of the House from Texas, stated that

> "Texas was admitted into the Union with specified boundaries, subject only to the right of the United States to settle all questions of boundary which may arise with other governments. This was a naked power, coupled with no interest, which must be strictly construed. Under it the Texas boundary, with any foreign government, might have been settled. But, as the late treaty with Mexico removed the possibility of such a question with any other government, the power is at an end. Neither could the United States, thus acting as the trustee of Texas to settle the boundary with other governments, acquire of any government a right in opposition to the claim of Texas. To assert such a proposition is to affirm that the trustee may acquire the subject matter of the trust in oppo-

[56] Appendix to Cong. Globe, 31st Cong., 1st Sess. 1574.
[57] *Id.* at 713-714.

sition to the beneficiary, or that the judge or arbitrator may adjudge the subject of controversy to himself in opposition to the parties litigant. It is evident that whatever right the United States acquired under the treaty with Mexico to the country east of the Rio Grande was acquired as the trustee of Texas and inures to the benefit of that State."[58]

Governor Wood, of Texas, wrote the following letter to President Polk on October 6, 1848:

"By the resolutions of annexation it is provided that 'the territory properly included within and rightfully belonging to the Republic of Texas, might be erected into a new State, to be called the State of Texas.' . . .

"The object and purpose of this reservation in the resolutions, cannot be misconceived. It was asked on the one hand and yielded on the other, in order that the Government of the United States might not have to approach the settlement of her actual or prospective difficulties with Mexico, clothed with only a qualified and imperfect power of adjustment. In a spirit of confidence which she hopes never to have occasion to regret, Texas constituted the Federal Government her agent and trustee in the adjustment of her boundary. And had that Government, induced by any of those high considerations of justice or national policy, in exercising that trust, deemed it proper to yield a portion of the territory claimed by Texas, remote from her settlements, and making fair compensation therefor, as she would have been bound to do, not an expression of dissatisfaction would have been heard from her. This was a liberal and

[58] Cong. Globe, 31st Cong., 1st Sess. 207.

humane offering which she was prepared to make on the altar of peace. Construe this condition in any other wise, and suppose the power of adjusting our boundary to be a general one, Texas occupies a strange and anomalous position in the Union, unlike that of every other State. Instead of being a co-equal with them, she is made a mere appendage; dependent for her very existence upon the capricious favors of power.

"Standing then in the relation of an agent or trustee towards Texas, the General Government in any treaty or negotiations in regard to boundary, could not acquire a right to territory within limits even claimed by her, much less where that claim had been acknowledged on their part. To permit this to be done, would be a subversion of the settled principles of law and equity in such case. For it would be to allow the agent to contract against the rights of his principal, the trustee against those of his *cestui que trust*, the guardian against those of his ward, and to divert their acquisitions in these capacities to their own use."[59]

Certainly this authority given to the United States was not intended to permit the United States to "adjust" the boundaries of Texas for its own benefit, as the United States seeks to do in this case. This was indicated in a speech by Mr. Harris, of Alabama, on June 10, 1850, who, in discussing the compromise question, said:

". . . According to every principle of justice and law, the country acquired from Mexico, inured to the benefit of Texas, up to the last

[59] House Journal (1849) 226-228.

inch of her asserted boundary. The United States cannot claim now, that any portion of it is beyond the limits of the State of Texas, and assert a right of property in themselves. To do so, would not be more unconscionable than if an umpire selected to adjust a matter of controversy, should purchase the claim, however exorbitant, of one of the parties, and then decide in favor of himself. So, sir, whatever doubt may have reasonably existed upon this question of boundary prior to the annexation of Texas, the whole world is now estopped from making it a subject of inquiry.

". . . And any portion of the territory claimed by Texas, which this Government may seek to appropriate to itself, will be taken in its character of an undisguised and shameless plunderer."[60]

In its brief the United States "cautions that the balance should weigh against including areas of potential international controversy under the 'vacant and unappropriated lands' clause, unless the strongest reasons exist for doing so."[61] It is significant, however, that the United States does not contend that the Rio Grande, admittedly owned by Texas, should not be included within that clause, since that boundary is the only one over which there has been any international controversy. The same argument plaintiff makes here is just as applicable to the Great Lakes; yet, the United States has adjusted with Canada the boundaries of Michigan, Ohio, Pennsylvania, and New York in the center of the

[60] Appendix to Cong. Globe, 31st Cong., 1st Sess. 781.
[61] Brief for the United States, p. 40.

Lakes without deeming the act an implication of ownership of the subsoil which this Court has held to belong to the States having it within their "adjusted" boundaries.[62]

In its brief the United States says that "in 1845, as today, the marginal sea was the potential subject of a grave international dispute which might be settled by various international undertakings and commitments bearing directly on rights in, and the control and use of, that area."[63] This argument is rendered wholly inapplicable when it is understood that the Rio Grande River line was the real dispute. It was settled by war and several treaties but the bed and subsoil are admitted to belong to the State, and we can and will offer opinions by the Attorney General of the United States holding that the bed was retained by reason of the retention by Texas in the Annexation Agreement of the "vacant and unappropriated lands lying within its limits."

### THE "PROPER TERRITORY" CLAUSE

As shown in the boundary discussion, *supra*, p. 63, the three-league boundary of the Republic of Texas was recognized by the United States and other major nations of the world. The marginal sea, having been properly included within, and having rightfully belonged to, the Republic, was a part of the new State of Texas.

### THE NATIONAL SOVEREIGNTY CLAUSE

Defendant recognizes that the Federal Government is possessed of paramount governmental

[62] See national sovereignty discussion, this page.
[63] Brief for the United States, p. 40.

powers over the marginal sea belt here in controversy. These powers are attributes of national sovereignty. That ownership of lands and minerals in the marginal sea is not a necessary attribute of national sovereignty, [64] however, is recognized by the *California* decision. There, Mr. Justice Black indicated that "a congressional surrender of title" to the resources of the soil under the marginal sea could be made to the coastal states.[65]

In 1946, Congress passed a joint resolution quitclaiming to the coastal states submerged lands in their marginal belts, but this resolution was vetoed by the President. Such a quitclaim would not in any way affect the paramount governmental powers of the Federal Government, since these powers exist over all property at all times. As said in the *California* opinion with reference to the State's police powers in the area, these cannot and do not "detract from the Federal Government's paramount rights in and power over this area."[66]

The plaintiff does not argue that transfer of national sovereignty included ownership of the lands and minerals in controversy as a matter of law. In fact, in its brief in the *California* case, at p. 89, plaintiff said:

> "We do not argue that the effective exercise of the foregoing powers (national defense, commerce, international relations) granted to the

[64] As to minerals, see *Moore v. Smaw* and *Freemont v. Flower*, 17 Cal. 199 (1861), opinion by Field, later a member of this Court, *supra*, p. 124.

[65] 332 U.S. 19, at 39. See also quotations at 27 and 40 copied in footnote 11, pp. 8-9, *supra*.

[66] 332 U.S. 19, at 36.

> Federal Government by the Constitution would be impossible without ownership of the marginal sea."

The argument urged in this case concerning the transfer of national sovereignty is that it indicates the parties intended the clause retaining lands "lying within its boundaries" to be exclusive of the marginal belt within those boundaries. The point has been fully answered hereinabove in connection with the other clauses of the Annexation Agreement which refer wholly to governmental powers. It can be shown from the records to be introduced in evidence that many representatives of the contracting parties understood that the new State would own the lands in controversy, and, from our research, it is doubtful if plaintiff can show that a single member of Congress or any of the negotiators believed that national sovereignty required or implied national ownership of this property. Why should it, when the ownership itself is subject to, and must never interfere with the exercise of, the paramount governmental powers of the national sovereignty over the area?

That State ownership of the subsoil of the marginal sea does not in any way conflict with the exercise of these powers by the Government was indicated in an opinion of the Attorney General of the United States dealing with the treaty power of the United States over fisheries in the Great Lakes. The *Genesee Chief* case, 12 How. 443 (1851), had already compared the Great Lakes to the open ocean. There the Court said:

> "A great and growing commerce is carried on upon them between different States and a for-

> eign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the admiralty court to administer international law, and if the one cannot be established, neither can the other." 12 How. at 453-454.

The Attorney General's opinion was written shortly after the decisions of *Illinois Central Ry. v. Illinois*, 146 U.S. 387 (1892), and *United States v. Rodgers*, 150 U.S. 249 (1893). In the *Illinois Central* case, it was held that "the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits."[67] Soon after this de-

[67] In holding that the States own the beds of the Great Lakes, this Court said:

> "The same doctrine is in this country held to be applicable to lands covered by the fresh water in the Great Lakes over which is conducted and extended commerce with different States and foreign nations. These Lakes possess all the general characteristics of open seas, except in the freshness of their waters and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tidewaters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these Lakes. 146 U. S. at 435.
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> . . . .
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> "We hold, therefore, that the same doctrine as the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tidewaters on the borders of the sea." 146 U.S. at 436-437.

cision, the *Rodgers* case compared the waters to the Black Sea and held them to be "high seas" subject to the admiralty jurisdiction of the United States.[68]

The opinion of the Attorney General[69] held that the President and the Senate had the power to conclude a treaty for the protection of fisheries in the Great Lakes, even though it deprived the states of jurisdiction and authority then vested in them. As authority for this conclusion, the Attorney General quoted from *Geofroy v. Riggs*, 133 U.S. 258 (1889), where the Court said:

> "The treaty power as expressed in the Constitution is in terms unlimited except by those restraints which are found in that instrument against the action of the Government or of its departments, or those arising from the nature of the Government itself and that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the Government or in that of one of the States, or a cession of any portion of the territory of the latter without its consent. But with these exceptions it is not perceived that there is any limit to it touching any matter which is properly the subject of negotiations with a foreign country."

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[68] It should be pointed out that the eight Great Lakes States have a total of 60,306 square miles of submerged lands beneath the Lakes which have been held to belong to them. This is more than twice the amount of acreage claimed by the twenty-one coastal States within their combined marginal belt. Michigan alone, with 24,613,760 acres under the waters of the Lakes, has more acreage than the coastal state belts combined. See Senate Judiciary Committee Report, Senate Report 1592, 80th Cong., pp. 129-130, re S. 1988.

[69] 22 Ops. Att'y. Gen. 214.

Thus, State ownership of the subsoil of these lakes, which are held to be "high seas," did not conflict with the Federal Government's powers of concluding treaties and conducting relations with foreign countries.

Likewise, the ownership by Texas of the subsoil of the Gulf of Mexico within its boundaries has never conflicted with the defense and foreign affairs powers of the Federal Government. These powers have been exercised by the United States in this area for more than one hundred years. We can show by evidence that there has been no instance of conflict with, or interference by, the State of Texas in the exercise of these powers. The complete absence of any conflict with the national defense and commerce powers of the Federal Government is shown by the fact that any occupancy and use of these lands and waters must receive the prior approval of the Corps of Engineers of the United States Department of Defense. This is shown also by the fact that during the two World Wars the Federal Government readily obtained all of the oil needed from this area for supplying the nation's armed forces, at the price fixed by the Government.

(6) *Subsequent construction confirms this interpretation of the Agreement.*

The intention of the parties that submerged lands and minerals were to be retained by the State of Texas is shown in bold relief by the subsequent construction of the Annexation Agreement by both the United States and Texas. As previously shown, the

United States in the Treaty of Guadalupe Hidalgo in 1848, in the Gadsden Treaty in 1853, and in the surveying of the international boundary between the United States and Mexico in 1911 expressly recognized the three-league boundary of the State of Texas in the Gulf.

The evidence will show that inventories were made, by both Federal and State officials, of the property which was to be ceded by the State to the United States, deeds of cession delivered on the real property, and formal acceptance made of both real and personal property by United States officials. The United States accepted this property and made no claim to any other.

For over one hundred years after annexation, the State of Texas has exercised complete control over the lands, minerals, and waters of the Gulf of Mexico within three leagues of its coast, subject, of course, to the paramount powers of the United States over foreign affairs, national defense, navigation, and commerce.

The State has passed legislation to control fishing in these waters, cultivatation of oyster beds, the extraction of oil, sand, and gravel from these submerged lands, the building of docks and piers over these waters and lands, and the granting of all property rights for public improvements as far as three and one-half miles from shore. Regardless of other explanations which might be used to justify their enactment, these statutes and many others actually have been enacted on the basis that Texas owned the lands to which the regulations applied.

The State has exercised its jurisdiction and control over this area without conflict with the paramount powers of the Federal Government over commerce, navigation, national defense, and foreign affairs. For example, as early as 1856 the legislature passed an act granting the State's consent to the United States to construct breakwaters, jetties, dams, and other works for the improvement of harbors, bays, and arms of the sea, and to take from the public domain of the State and private individuals, on paying just compensation, the materials necessary for the construction of such works.[70]

The evidence will show that all acts of possession, control, and use that could be exercised by private ownership have been exercised by the State of Texas. All this was done with the knowledge of, and without protest from, the United States. Instead, the United States has in many instances recognized the right and title of the State to these lands and minerals. An example of such recognition is that the United States has requested, and the State has executed, patents and deeds of cession to certain submerged lands in the Gulf of Mexico.[71]

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[70] Acts, 6th Leg. 1855, 11; 4 Gammel's Laws of Texas 191.

[71] Two examples are as follows:

On June 28, 1912, the State of Texas, at the request of the United States, patented to the United States 658 acres of land on Galveston Island and also submerged lands on which Galveston Jetty was constructed, extending over three miles beyond low-water mark in the Gulf of Mexico. (General Land Office, State of Texas, Patent No. 47, Vol. 39, File 103.)

On December 6, 1880, the State of Texas granted to the United States a tract of "Sub Marine land" 10,480 feet from Boliver Point Lighthouse Tower and 17,280 feet W 27° N from North Breaker Beacon of Galveston harbor, the land being covered by four or five feet of water. (Patent No. 633, Vol. 32, p. 633.)

Another example of recognition by the United States of the ownership by Texas of all lands within the original boundaries of the Republic is an opinion written by the Attorney General of the United States on August 4, 1908.[72] The question involved was whether the title to the abandoned bed of the Rio Grande, around what is known as "Cordova cut-off" within the city limits of El Paso, was in the United States, the State of Texas, or the riparian proprietors. The Attorney General in that opinion recognized that the title to the river bed was in the State of Texas, saying:

> "I am therefore of opinion that all vacant and unappropriated lands within the limits of Texas which belonged to the Republic of Texas now belong to and are vested in the State of Texas and that the title to the same has never been in the United States, the United States owning in the State of Texas only such lands as have been acquired by purchase or condemnation under the laws of Texas and such land as was excepted by the Joint Resolution referred to above."

Another example is an opinion of the Department of the Interior in 1919.[73] In that opinion, the First Assistant Secretary held that the United States is without jurisdiction over the vacant and unappropriated lands within the State of Texas. The opinion also stated that the United States has no duty to perform in Texas as to surveys, determinations, or ad-

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[72] Opinion No. 18089-12-13, Records of Boundaries and Claims Commissions and Arbitrations: Mexican Boundary, Envelope 37, National Archives.

[73] 47 Decisions of the Department of the Interior in Cases Relating to the Public Lands (1921) 372.

justments necessary to define the rights of any parties in interest; they must be performed by the State or such other tribunals as may have authority therefor.

The First Assistant Secretary said:

> "It is clear that the United States is bound by contract to permit Texas to retain her public lands, and by treaty and international law is compelled to recognize that private rights preserve the legal value which they possess. Thus, whether a claim to lands is public or private, the United States has nothing whatever to do with it as a proprietary interest in Texas. . . . It is clear that when the United States agreed that Texas should retain its vacant and unappropriated lands, it was recognized and admitted that the State of Texas should take the title of the Republic of Texas in and to such lands." (378-379.)

These are only a few examples of the evidence which Texas has collected throughout the past year bearing on the subsequent construction of the Annexation Agreement by both the United States and Texas. For over a year, full time researchers have been collecting this evidence from the State Archives, the files of various State departments, county records, the National Archives, the Library of Congress, and the files of various departments of the Federal Government. This evidence necessarily is voluminous and can properly be presented only by a record made before a Master.

This evidence will form a most convincing chain of continuous subsequent interpretation by the par-

ties to the contract. It is not sought to be offered on a contention that the President of the United States, the Attorney General, the Secretary of State, the Secretary of the Interior, the Secretary of War, or other officials could by their acts alone estop the United States from any claim it might now make. On the contrary, the evidence of their acts will be offered strictly as subsequent interpretations by responsible officials of the intention of the parties at the time they made the Annexation Agreement. That evidence of this type is probative in determining the intention of parties to a treaty was recognized in *Massachusetts v. New York*, 271 U.S. 65, 95-96 (1926).

The intention that Texas retain all lands and minerals within the boundaries of the Republic is shown also by the subsequent construction of the Annexation Agreement by both Federal and State courts.

In *Amaya v. Stanolind Oil & Gas Co.*, 62 F. Supp. 181, 188 (S.D. Tex. 1945), *aff'd* 158 F. 2d 554, *cert. den'd* 331 U.S. 808, referring to the Joint Resolution of Annexation, the court said:

> "Another matter worthy of note with reference to this joint resolution was that the *only ceding* done by Texas to the United States was in the second paragraph, which reads, in part, as follows:
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> "'. . . . After ceding to the United States, all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defense belonging to said Republic of Texas. . . .'

*"The balance of such property rightfully belonging to the Republic of Texas was reserved by the new state."*

The State's "unquestioned . . . ownership of the waters and submerged lands of the Gulf of Mexico" was recognized in *City of Galveston v. Mann*, 135 Tex. 319, 143 S. W. 2d 1028, 1032-33 (1940), the court saying:

> "In the Resolution of the Congress of the United States pertaining to the Annexation of the Republic of Texas as a State into the Federal Union, of date March 1, 1845, 5 Stat. 797, it was provided that the Republic retained for the State 'all the vacant and unappropriated lands lying within its limits,' subject only to the superior rights of navigation of the Federal government in the navigable waters of the State. . . .
>
> "This Court in many important decisions has zealously guarded and enforced the rights of this State to the public lands of the State as provided and guaranteed to it in the foregoing resolutions of the Republic of Texas, the resolutions of the United States Congress appertaining to the annexation of the Republic of Texas, and in the Acts passed by the legislature of the State of Texas."

It was thus recognized by the court that "vacant and unappropriated lands" included the lands under all navigable waters within the boundaries of the Republic and State of Texas and that

> "The State is the source of all title to land in this State, including the navigable waters of the

> State . . . [and] anyone claiming title to any particular portion of the State's property must show that the same has been segregated by some formal grant or purchase, and that it no longer forms a part of the State's domain." 143 S. W. 2d at 1034.

*State v. Jadwin*, 85 S. W. 490, 491-92 (Tex. Civ. App. 1904, error ref.) involved the title to certain lands on the east end of Galveston Island. Defendants alleged that they were agents of the United States government and held possession under the title of the United States. The question before the court was: "Did the United States government get title to any land on the east end of Galveston Island by virtue of the annexatoin treaty with the Republic of Texas?" In upholding the title of the State to the land, the court said:

> "Whether, then, the federal government thereby acquired any land on the east end of Galveston Island, depends on whether at the date of admission into the Union the republic of Texas had devoted any land at that point to defensive purposes. Neither by the articles of annexation nor otherwise were any lands on the island conveyed to the United States by any more definite description than that above given.
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> . . .
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> ". . . The state showed that the land sued for was within its borders. It then, of course, developed upon defendant to show that it had in some way parted with its title. . . . It may be also mentioned in this connection that the United States has, since the admission of Texas into the Union, purchased a tract of land on the east end

of the island, and one in the shallow waters adjacent, and in neither instance was any assertion of title made to the lands in question. . . . The land upon the island belonged to the state. Equally the waters of the bay and the gulf for three leagues from the shore. As between Texas, as the grantor, and the United States, as grantee, the grant could not be enlarged by accretion. What Texas granted to the federal government was the specific lands devoted to purposes of public defense. . . . ."

An appeal was taken to this Court, but the appeal was dismissed by the Solicitor General of the United States. The records of the Solicitor General show that the reason for the voluntary dismissal was that there appeared "no ground upon which this case can now be reversed." The United States recognized throughout the case that its only claim to the land, every portion of which during the controversy had been under water either of the bay or the Gulf, depended upon whether the land was a part of a defense installation or military reserve of the Republic of Texas at the time of annexation.

**c. The Long-Continued Possession of These Lands and Minerals by the Republic and State of Texas, Acquiesced in and Approved by the United States, Precludes an Assertion by the United States of Rights Inconsistent Therewith.**

In addition to its other defenses, defendant has pleaded as a special defense to plaintiff's action herein that the State of Texas, under the doctrine of prescription, has established such title, ownership, and

sovereign rights in the area as preclude the granting of the relief prayed for by the Federal Government.

The questions of fact and of law raised by this affirmative defense were passed upon by the Court in *United States v. California*, 332 U.S. 19. There the Government argued, and the Court apparently held, that the United States acquired full rights in the submerged lands off California's coast from the Republic of Mexico prior to the admission of California as a State, that these rights were not ceded by the Federal Government to the State of California at the time of its admission into the Union, and that California had not purported to occupy the land adversely to the United States until comparatively recent times. Thus the Court said:

> "As a matter of fact, the record plainly demonstrates that until the California oil issue began to be pressed in the thirties, neither the state nor the Government had reason to focus attention on the question of which of them owned or had paramount rights in or power over the three-mile belt." 332 U.S. at 39.

This statement was made by the Court upon the basis of a record to which the State had agreed and "neither [party had] suggested any necessity for the introduction of evidence" as to the nature of the State's adverse claim. 332 U.S. at 24.

No such situation is presented here where the case arises upon motion for judgment on the pleadings and the plaintiff apparently urges that as a matter of law prescription is not available to the defendant.

The basic facts alleged by the State of Texas in support of this affirmative defense are that as to the

lands and minerals in controversy, the United States has never been in possession of them nor has the Congress or any federal official, except by this suit, asserted a claim to them adverse to that of the State of Texas. Any rights which the United States could have acquired in the area arose subsequent to the claim and possession of the Republic of Texas. During more than one hundred years, the Republic of Texas and then the State is alleged to have had open, adverse, exclusive, and uninterrupted possession of the land and minerals in controversy under claim of ownership, subject only (after annexation) to the constitutional paramount powers of the Federal Government. The State can by evidence show actual use and possession of the bed, subsoil, and minerals continuously from 1836 to the present time. It began this claim as an independent nation and has asserted it against not only the United States but against the world. In an international court prescription would prevent foreign nations from prevailing against Texas, and Texas' prescriptive title should not be destroyed now since Texas is one of the United States. What Texas owns against the outside world inures to the benefit of the nation. There is no wealth held by a single State of the Union which is not also a part of the total wealth of the nation and entitled to the respect and protection of the nation.

In such a situation the doctrine of prescription is clearly available to the State. In the early case of *Phillips v. Payne*, 92 U. S. 130, 132 (1875), this Court said:

> "The law of prescription applies to nations with the same effect as between individuals."

See also *Arkansas v. Tennessee*, 310 U.S. 563, 570 (1939). This doctrine of prescription has been expressly held by this Court to apply between Texas and the United States at a time when the United States held New Mexico as a territorial possession. *New Mexico v. Texas*, 275 U.S. 279, 298-299 (1927). The Court said:

> ". . . that, for at least thirty years prior to the admission of the territory of New Mexico as a State, the United States made no challenge of the claims to the land asserted by Texas and its citizens and, impliedly at least, recognized the practical line that had been established as the boundary between the Territory and Texas."

On the other hand, all of the cases which plaintiff cites in support of a contrary proposition involve controversies between private individuals and the United States.[75] In all of these cases the United States was the original owner of the proprietary rights involved. In none of plaintiff's cases was the issue raised under circumstances in which the United States was a subsequent claimant to a State which began its prescriptive rights as an independent nation. It is, therefore, respectfully submitted that under the facts contained in defendant's first affirmative defense, plaintiff has shown no authority warranting its proposition that the doctrine of prescription is not available as a matter of law to the State of Texas.

Moreover, since the present case arises on the pleadings, it is well established that a plea of adverse possession raises such an issue of fact as to the na-

[75] Brief in Support of Motion for Judgment, p. 65.

ture of the claim asserted and the circumstances of its manifestation as will render improper the granting of a motion for judgment on the pleadings.[78]

**d. The United States Is Estopped by the Acts of the Congress Alone or of the Congress and of the President to Deny the Rights of Texas to the Lands and Minerals in Controversy.**

Since they depend ultimately upon the same basic principle, the second and third affirmative defenses will be treated together. It should, however, be borne in mind that they rest on distinct acts or combinations of acts on the part of the United States which defendant alleges are sufficient to preclude the Federal Government from asserting the rights here sought to be asserted.

The first affirmative defense alleges that the Republic of Texas having been an independent nation recognized as such by the nations of the world, having validly fixed its boundaries three leagues from shore, having brought the area therein under its domestic law, and not having ceded to the United States by the Annexation Agreement the ownership or the same kind of paramount rights said in the *California* case to belong to the Federal Government, the United States is estopped and precluded by its acts in accepting the cessions of specifically named public property and sovereignty contained in the Annexation Agreement from now asserting rights con-

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[78] *Barnes v. South Pacific Co.*, 300 F. 481 (9th Cir. 1924); cf. *Cook v. Burnley*, 11 Wall. 659, 669 (1867); *Hill v. McCord*, 195 U.S. 395, 400 (1904); *United States v. Chaves*, 159 U.S. 452, 456 (1895); *McMickin v. United States*, 97 U.S. 204 (1877).

trary to that Agreement. The second affirmative defense alleges that the foregoing acts, considered with subsequent acts of the Congress and of the President and the Senate of the United States recognizing and confirming the original Agreement, constitute an estoppel precluding the United States from asserting, as against the State of Texas, the rights which it seeks in this case.

The basis of the estoppel thus alleged, the possibility of which the plaintiff does not undertake to dispute in its brief, is entirely distinct from the type of estoppel raised by the State of California in *United States v. California* and concluded against that State by decision of this Court. The estoppel involved in the latter case is an estoppel based upon the acts of certain officers and agents of the United States. As to such acts this Court quite properly said:

> "Officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." 332 U.S. at 40.

On the other hand, the acts upon which the State of Texas relies as creating an estoppel against the United States are not the acts of officers or agents of the United States who lack authority to dispose of Government property, but are instead the acts of the very branches of the Federal Government whose constitutional power it is to dispose of any property

rights which the United States of America may have."[11] *Jones v. United States*, 137 U.S. 202 (1890).

Estoppel, like prescription, resting on considerations of fairness and justice, has been applied between sovereign nations. See Lauterpacht, *Private Law Sources and Analogies of International Law* (London, 1927) 203-207, citing seven important international arbitration cases where estoppel was made the basis of the award. At the time Texas entered into the agreement of annexation with the United States, both were sovereign nations. Under the terms of that agreement the Republic relinquished to the United States its national sovereignty and ceded to the United States specifically described public property. The terms of that agreement likewise included certain guarantees, including the ~~reservation to~~ the Republic in its capacity as a new State of "vacant and unappropriated lands lying within its limits." The United States accepted the benefits of this international contract—accepted it by acts of the branch of the Government which has the ultimate power within our constitutional system to agree on behalf of the United States what property should and what property should not come to the United States under the agreement. By accepting the cessions of public property and sovereignty made

[11] As the Court said in the *California* case:

"For Article IV, Sec. 3, Clause 2 of the Constitution vests in Congress 'Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' We have said that the constitutional power of Congress in this respect is without limitation, *United States v. San Francisco*, 310 U.S. 16, 29-30." 332 U.S. at 27.

by the State of Texas in carrying out this agreement, the United States is precluded from seeking to enlarge the bargain more than one hundred years later when it appears that Congress might have driven a better bargain than the one which it actually made in 1845. Such considerations were in the mind of this Court when it said in *United States v. Texas:*

> "But it is said that the United States has in many ways, and during a very long period, recognized the claim of Texas to the territory in dispute, and upon principles of justice and equity should not be heard at this late day to question the title of the State.
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> ". . . This question deserves the most careful examination; for, long acquiescence by the General Government in the claim of Texas would be entitled to great weight." 162 U. S. 1, 60-61 (1896).

Defendant believes that when all the evidence is before the Court the considerations of justice and equity in favor of the State of Texas will be conclusive on this point.

The injustice of a contrary result will, on all the evidence, appear more clearly when consideration is made of the conduct of the President and the Senate in the exercise of the treaty-making power of the United States. These specific treaties which recognized and confirmed the southern segment of Texas' three-league boundary where it adjoins the Republic of Mexico (see *ante*, p. 84-90) constitute that class of acts on the part of the United States (as distinguished from the unauthorized acts of an officer of

the United States) upon which the State of Texas was entitled to, and did, rely as confirming its retained right of property in the seabed and subsoil minerals within its original three-league boundary. The United States having so acted and the State having relied upon those acts and having changed its position in consequence thereof, the United States is now estopped to assert a claim contrary in legal effect to those acts and representations by its duly empowered branches of Government.

If the plaintiff disputes the basic facts with regard to the consummation of these acts on the part of the United States and the reliance of Texas thereon, defendant submits that its two pleas of estoppel against the United States raise issues of fact and of law which can only be adequately considered and disposed of after a full hearing of all the evidence relating to these fact issues.

**e. As to That Part of the Continental Shelf Outside the Original Three-League Gulfward Boundary of Texas, the Federal Government Has No Cause of Action Against Texas on Which to Base Its Plea for Judgment or Injunction.**

*Statement*

The previous argument concerning the part of the continental shelf within the original three-league Gulfward boundaries of the State of Texas does not directly apply throughout to the part of the shelf beyond those boundaries. Neither the United States nor Texas made any assertion of dominion over the shelf beyond the three-league boundary line until recent years.

In 1941 the Legislature of Texas passed an Act making its Gulfward boundary a line twenty-seven miles from low-water mark.[75] In 1945 (September 28) President Truman issued a Proclamation declaring that the jurisdiction of the United States extends over the natural resources of its continental shelf beyond territorial waters to the edge of the shelf.[76] Thereafter, May 23, 1947, the Legislature of Texas passed an Act extending its territory gulfward to the edge of the continental shelf.[77] Thus, the United States, internationally, and the State of Texas, domestically, have asserted jurisdiction over all the continental shelf lying beyond the original Gulfward boundary lines of the Republic of Texas and within its present extensions of those lines.

No question of present-day international law concerning these claims is involved in this case. Neither does plaintiff, for the purpose of this case, question the validity of Texas' boundary extensions. (Plaintiff's brief, p. 72.) For its intended purposes the Presidential Proclamation is valid.

However, the validity of the Proclamation and its effect in our domestic law do not settle the problem of the distribution between State and Federal governments of ultimate jurisdiction and ownership over those resources. That is a matter of our federal constitutional law and of legislation thereunder. The

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[75] Acts, 1941, 47th Leg., Ch. 286, p. 454.

[76] 3 C.F.R., 1945 Supp., Proc. 2667, 13 Dept. State Bull. 484, 485 (1945).

[77] Acts, 1947, 50th Leg., Ch. 253, p. 451.

President's Executive Order accompanying issuance of his Proclamation expressly so recognizes. The Order, in part, says:

> "Neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states relating to the ownership or control of the subsoil and seabed of the continental shelf within or outside of the three-mile limit."[78]

That it was not intended as an assertion of ownership or jurisdiction as against the States was again clearly stated in the White House press release issued contemporaneously and published with the Proclamation in the *Department of State Bulletin* as follows:

> "The policy proclaimed by the President in regard to the jurisdiction over the continental shelf does not touch upon the question of Federal versus State control. It is concerned solely with establishing the jurisdiction of the United States from an international standpoint."[79]

Therefore, the issue under plaintiff's Point III and this counterpoint is not whether Texas has title to, or paramount rights in; and dominion over, the continental shelf lands outside the marginal sea, but rather whether the United States has, as against Texas, such title, rights, or dominion as would entitle

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[78] 3 C.F.R., 1945, Supp., E. O. 9633.

[79] 13 Dept. of State Bulletin, 484 (Plaintiff's brief, appendix, p. 97).

it to the injunctive relief here sought. It is axiomatic that a plaintiff in an action of this nature must recover upon the strength of his own title and rights, or not at all. *McGuire v. Blount*, 199 U.S. 142; 18 *Am. Jur.* 21, § 20. "It is not incumbent upon the defendant to show any title." *Barrows v. Kindred*, 4 Wall. 399, 403 (1866).

The issue must be decided upon the rights, if any, that the United States now has to the area in dispute, *as against the State of Texas.* We are not here concerned with any claim that the United States may have in the future should Congress enact a bill now pending which declares "that the natural resources of the subsoil and seabed of the continental shelf appertain to the United States and are subject to its jurisdiction, control and power of disposition," and adjusts between the littoral States and the United States their claims and equities.[80]

Nor are we here any more concerned with questions of international law or international relations than was the Court in *Skiriotes v. Florida*, 313 U.S. 69, 72, 73 (1941). This controversy, as between the United States and Texas, involves no international rights and duties; rather, it involves, in the language of the *Skiriotes* case, "domestic rights and duties," and must be decided on principles of domestic or municipal law.

The acts of Congress cited by plaintiff are wholly irrelevant because they do not purport to apply to the natural resources of the subsoil of the continental shelf outside the marginal sea.[81] The Presidential

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[80] H. R. 5991, 81st Cong.

[81] Both the Attorney General and the Solicitor General of the Department of Interior have held that the present Min-

Proclamation, when properly construed as a formulation of international policy, for which it was intended, is likewise immaterial in an action challenging the right of Texas, at a time when Congress has not entered the field, to continue exercising governmental powers necessary to protect, develop, and conserve these natural resources. *Skiriotes v. Florida*, 313 U.S. 69 (1941); *Toomer v. Witsell*, 334 U.S. 385 (1948). Plaintiff's brief on Point III completely ignores the allegation of "ownership" in so far as this portion of the land is concerned. The Point is worded as follows:

> "The United States has, as against Texas, at least the same paramount rights in, and dominion over, the lands underlying the Gulf of Mexico outside the marginal sea, as it has with respect to the marginal sea."

Plaintiff devotes its argument to paramount governmental powers possessed by the United States over the area, all of which, by the terms of the Proclamation and other acts cited, are intended only as assertions of the United States for international purposes *vis-a-vis* other nations. They make no attempt whatever to determine as between the Federal and State governments the respective rights within the area.

*Domestic Law*

The only domestic legislation applying to this area of the shelf is that enacted by the State of Texas.

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eral Leasing Act does not apply to these lands. Opinion M-34985, August 8, 1947, from the Solicitor of the Department of the Interior to the Secretary of the Interior; letter opinion from Attorney General Tom C. Clark to the Secretary of the Interior, August 29, 1947.

When Texas, on May 16, 1941, extended its Gulfward boundary to a line twenty-seven marine miles from its coast,[82] the President had not even asserted jurisdiction over the shelf for international purposes. The traditional policy of the United States with reference to that area had been expressed in a letter dated September 10, 1918, from the State Department to a Texas citizen who asked whether he could acquire from the United States leasehold rights on a reef in the Gulf of Mexico about forty miles from land where the water was less than one hundred feet deep where he hoped to discover a large oil pool. The Assistant Secretary stated:

> "In reply the Department informs you that the United States has no jurisdiction over the ocean bottom of the Gulf of Mexico beyond the territorial waters adjacent to the coast. Therefore, it does not appear possible for the United States to grant to you the leasehold or other property rights in the ocean bottom which you desire."[83]

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[82] Acts, 1941, 47th Leg., Reg. Sess., Ch. 286, p. 454 (Plaintiff's brief, appendix, p. 91).

[83] Asst. Sec. Adee to F. R. Newton, September 10, 1918, MS. Dept of State, file 312.11/8645, quoted in II Hackworth, *Digest of International Law* (G.P.O. 1941) 679, Sec. 204. The letter added:

> "The Department further informs you that, unless the erection of an artificial island interfered with rights of the United States or of its citizens, or formed the subject of a complaint made upon apparently good grounds, by a foreign government, it is not likely that this Government would object to the erection by American citizens of such an island as you suggest. The Department is not in a position to procure information from other nations as to their attitude toward such a project, but it would seem that no foreign gov-

Many publicists prior to 1941 had written that subsoil resources under the high seas beyond territorial waters could be occupied and used by the owner of the shore as an extension of the land mass, or by an individual if there was no interference with navigation and the laws of his State or nation."

The State, realizing the possible benefits to State and Nation, decided to make provision for an orderly development of the resources of the area adjacent to its three-league seaward boundaries, under reign of law. To this end it extended over it the jurisdiction of its highly developed and effective conservation agencies, thereby preventing pollution and destruction of fisheries, in addition to conserving the important natural mineral resources. At the same time it devoted the monies from licensing and leasing to the support of its public schools.

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ernment would interfere with the erection of an artificial island in the Gulf of Mexico unless its interests or the rights of its citizens were injuriously affected thereby.

"It may also be observed, although the Department can give no assurances on the subject, that it would seem possible that, if an island were constructed 40 miles from the coast of the United States, by the efforts of American citizens and inhabited and controlled by them in the name of the United States, this Government would assume some sort of control over the island. However, it would seem that some special action by the President and Congress would be necessary to this end. If the island were erected, and if the United States assumed control over it, it would then be possible to take such steps as were necessary to protect the rights of the occupants."

" As representative of these see: 1 Gidel, *Le droit international public de la mar* (Paris, 1932) 508ff; J. P. A. François, "Régles générales du droit de la paix." 66 *Recueil des cours, Academie de droit international* 1, 45 (1938).

In doing so it recognized the constitutional rights of the United States and relied on its concurrence and protection. No protests were received from foreign governments nor were any made by that department of the Federal Government charged with the conduct of foreign affairs.

After the Presidential Proclamation of 1945 extending the jurisdiction of the United States over "the natural resources of the subsoil and seabed of the continental shelf," solely "from an international standpoint" which was not intended to "touch upon the Federal versus State control," the State of Texas extended its jurisdiction and boundaries to the edge of the shelf. Its action was subject to all paramount constitutional powers of the Federal Government. It was in line with the whole concept of the continental shelf being appurtenant to and properly within the jurisdiction of the government of the adjacent land. It was not thought then and is not thought now that the President intended or that the Congress would intend to make these resources a part of the nation without making them also a part of the respective adjacent states. Such has been the history of all accretions or acquisitions of property adjacent to present states of the Union.[*] It was the same con-

[*] Examples are boundary agreements with Canada on the Great Lakes whereby ownership and jurisdiction of the Great Lakes States reach more than 30 miles beneath the waters; and boundary treaties with Mexico as a result of which ownership and jurisdiction passes to Texas over tracts of land left on the Texas side by avulsive changes of the Rio Grande River. In order to remove any question that the jurisdiction in such cases passes to Texas, Congress in 1921 passed an act providing

". . . . that all lands and bancos acquired by the United States of America by virtue of its treaty

cept of federal-state relations described in a unanimous decision of the Supreme Judicial Court of Massachusetts, rendered while Mr. Justice Holmes was a member of that court, as follows:

> "There is no belt of land under the sea adjacent to the coast which is the property of the United States and not the property of the states."[56]

Also, the State had as its authority in so far as its own citizens were concerned the United States Supreme Court decision in *Skiriotes v. Florida*,[57] which held that a State legislature may validly fix the area in the adjacent seas within which the laws

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with the United States of Mexico, of March 20, 1905, and subsequent thereto, and which lie adjacent to the territory of the State of Texas as constituted by the compromise Act of Congress of September 9, 1850, and accepted by the State of Texas on Nov. 9, 1850, shall be and become a part of the State of Texas, and shall be under the Civil and Criminal Jurisdictions of the State of Texas, and of the respective subdivisions of said State of Texas, wherein said land lies; and that lands or bancos *hereinafter* acquired by the United States of America from the United States of Mexico, by virtue of said treaty, which shall lie adjoining to the State of Texas, shall be and become a part of said State of Texas and be subject to the Civil and Criminal jurisdiction without any further enactment from the Congress of the United States." 42 Stat. 359 (1922), 43 U.S.C. § 697 (1946).

[56] *Commonwealth v. Manchester*, 152 Mass. 230 at 241, 25 N. E. 113 at 116 (1890), *aff'd. sub nom Manchester v. Massachusetts*, 139 U.S. 240 (1891). To the effect that jurisdiction over the remainder of the continental shelf should be vested in the several States by virtue of their respective rights in their currently recognized territorial waters, see Borchard, "Resources of the Continental Shelf," 40 *Am. Jr. Int'l L.* 59, 70 (1946).

[57] 313 U.S. 69 (1941).

of the State may be applied, at least as to its own citizens. In that case the State of Florida by its Constitution had defined its boundaries at three leagues from shore. Subsequently, a statute was passed regulating the taking of sponges "within the territorial limits of the State of Florida." The defendant (appellant) was prosecuted for taking sponges two marine leagues from shore in violation of the statute. In sustaining the conviction, the Supreme Court of the United States deemed it unnecessary to decide the validity of the boundary since, in the absence of conflicting Federal legislation, the State may exercise jurisdiction and control over the activities of its citizens in the adjacent high seas. The Court said:

> ". . . with respect to such an exercise of authority there is no question of international law,[88] but solely of the purport of the municipal law which established the duty of the citizen in relation to his own government. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355, 356; *United States v. Bowman*, 260 U.S. 94; *Cook v. Tait*, 265 U.S. 47; *Blackmer v. United States*, 284 U.S. 421, 437.
>
> ". . .
>
> "If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the

[88] In a footnote at this point, the court cites Oppenheim, *International Law*, 4th ed., Vol. 1, Sec. 145, p. 281; Story, *Conflicts of Laws*, 8th ed., Sec. 540, p. 755; Moore's *International Law Digest*, Vol. II, p. 255, 256; Hyde, *International Law*, Vol. I, Sec. 240, p. 424; Borchard, *Diplomatic Protection of Citizens Abroad*, Sec. 13, pp. 21, 22.

> State has a legitimate interest and where there is no conflict with acts of Congress. Save for the powers committed by the Constitution to the Union, the State of Florida has retained the status of a sovereign. . . .
>
> "There is nothing novel in the doctrine that a State may exercise its authority over its citizens on the high seas. That doctrine was expounded in the case of *The Hamilton (Old Dominion S. S. Co. v. Gilmore)*, 207 U.S. 398."[89]

By the same token, at least as to its own citizens, no question of the validity of the Texas boundary extension act arises. They were not then, and are not now, in conflict with any Act of Congress, and so far as we know they have not been objected to by any foreign nation.

For the purpose of this suit plaintiff has assumed the validity of the Texas boundary extensions to the edge of the continental shelf. In fact, the complaint uses these boundaries and refers to them as the boundaries of Texas in describing the land sued for. The complaint also recognizes for the purpose of this suit that the State has legislative and police powers over the area the same as over its land territory. For the purpose of this suit, the State of Texas admittedly has the same governmental powers over the natural resources of the subsoil of the continental shelf outside of its original three-league boundaries as within those boundaries.

### *Effect of the Proclamations*

It is certain that the Presidential Proclamations and Executive Orders of September 28, 1945, do not

[89] *Skiriotes v. Florida*, *supra*, at 73, 77.

even pretend to prohibit state legislation in the field or to change the municipal law of the United States.

Two Proclamations relating to the continental shelf were issued by the President on September 28, 1945. They were described in a White House press release published in the *Department of State Bulletin*, September 30, 1945,[90] as follows:

> "The President issued two proclamations on September 28 asserting the jurisdiction of the United States over the natural resources of the continental shelf under the high seas contiguous to the coasts of the United States and its territories, and providing for the establishment of conservation zones for the protection of fisheries in certain areas of the high seas contiguous to the United States. The action of the President in regard to both the resources of the continental shelf and the conservation of high-seas fisheries in which the United States has an interest was taken on the recommendation of the Secretary of State and the Secretary of the Interior."

The proclamations merely assert a policy of the United States with respect to fisheries on the high seas contiguous to the United States and with respect to the natural resources of the subsoil and seabed of the continental shelf "beneath the high seas but contiguous to the coasts of the United States." Various reasons are assigned by the President for assuming jurisdiction and control over the resources, but none purport to relate to domestic law or to create rights in the Federal Government against the States or to authorize the exercise of regulatory powers by the

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[90] 13 Dept. State Bull. 484.

Federal Government beyond those provided for in the Constitution. By their own terms, the Proclamations must be viewed only as a formulation of international policy—a means of placing other nations on notice of the policy to be pursued by the United States. Such was the interpretation given the Proclamations in the White House press release and the Executive Order contemporaneously issued and quoted above.

As heretofore shown, the Proclamations confine themselves to the field of foreign affairs. In that field, they serve a useful purpose. Texas and Louisiana had previously entered the field of regulating fisheries and licensing and regulating the production of oil and gas from the subsoil of the continental shelf beyond the marginal sea. The Proclamations had the effect of placing other nations on notice that the United States considers *vis-a-vis* the nations of the world that it has jurisdiction and control over the fisheries and subsoil resources of the continental shelf. The subsoil resources proclamation was tantamount to a declaration that this nation will not recognize the right of any other nation to exploit the natural resources of the subsoil of the continental shelf, some of which are being regulated, developed, and conserved under the laws of Texas and Louisiana. It was not issued as a means of notifying other nations of the domestic policy to be pursued between the United States and the several States of the union, or between the United States and its citizens.

The international policy proclaimed, like all international policies, concerns the rights of nations as such, and not the rights of political subdivisions and

individuals who are unknown in the conduct of foreign affairs. Their rights, duties and obligations are defined by their respective governments, according to their own internal laws.

As a domestic matter, the proclamations have only a limited effect. They serve to notify the States that the President may at some future time request Congress to enter a field that the States have occupied. But the President, without congressional authority, did not attempt to enter the United States into that new field to the exclusion of the States, as was specifically stated in his Executive Order and press release of the same date. Such an attempt would have been without effect.

Presidential proclamations issued without constitutional or congressional sanction have no force of law. *Muir v. Louisville & N. Ry.*, 247 F. 888, 895 (D. C. Ky. 1918). The President cannot, acting without the concurrence of Congress, annex territory[91] or extend the boundaries of the United States.[92]

The case of *Toomer v. Witsell*, 334 U. S. 385 (1948), decided after *United States v. California*, concerned the power of South Carolina to regulate fishing in the marginal sea after President Truman's Proclamation asserting jurisdiction over high-sea fisheries adjacent to the coasts of the United States. In that case the court held that since Congress had not entered the field with conflicting legislation, the State

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[91] *Fleming and Marshall v. Page*, 9 How. 603, 614, 615 (1850); *The James G. Swan*, 50 F. 108, 110, 111 (1892).

[92] *Foster and Elam v. Neilson*, 2 Pet. 253, 307 (1829); *United States v. Arredondo*, 6 Pet. 691, 711 (1832).

of South Carolina, even without ownership, had the "power to preserve and regulate the exploitation" of this important resource. The Court said:

> "The appellants too press a contention which, if correct, would dispose of the case. They urge that South Carolina has no jurisdiction over coastal waters beyond the low-water mark. In the court below *United States v. California*, 332 U.S. 19, 91 L. ed. 1889, 67 S. Ct. 1658 (1947), was relied upon for this proposition. Here appellants seem to concede, and correctly so, that such is neither the holding nor the implication of that case; for in deciding that the United States, where it asserted its claim, had paramount rights in the three-mile belt, the Court pointedly quoted and supplied emphasis to a statement in *Skiriotes v. Florida*, 313 U.S. 69, 75, 85 L. ed. 1193, 1199, 61 S. Ct. 924 (1941), that 'It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the [state] statute *so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation, is within the police power of the state.*'
>
> "Since the present case evinces no conflict between South Carolina's regulatory scheme and any assertion of federal power, the District Court properly concluded that the State has sufficient interests in the shrimp fishery within three miles of its coast so that it may exercise its police power to protect and regulate that fishery." 334 U.S. at 393.

Of course, if Congress should enter the field and exercise regulation and control in conflict with State laws, the United States would stand in a different

position in that portion of this suit involving lands outside of Texas' original boundaries. But, as indicated in *Toomer v. Witsell*, *supra*, until Congress exercises its paramount governmental right to regulate and control the removal of the natural resources of the subsoil of the continental shelf within the extended boundaries of Texas, the State is free to legislate and continue the exercise of its powers. As said by the Court in *Manchester v. Massachusetts*, 139 U.S. 240, 266 (1891):

> "The pertinent observation may be made that, as Congress does not assert, by legislation, a right to control pilots in the bays, inlets, rivers, harbors and ports of the United States, but leaves the regulation of that matter to the States, *Cooley v. Board of Wardens*, 12 How. 299, so, if it does not assert by affirmative legislation its right or will to assume the control of of menhaden fisheries in such bays, the right to control such fisheries must remain with the State which contains such bays.
>
> "We do not consider the question whether or not Congress would have the right to control the menhaden fisheries which the Statute of Massachusetts assumes to control; but we mean to say only that, as the right of control exists in the State in the absence of the affirmative action of Congress taking such control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the State."

The Proclamations and Executive Order 9633 not having been issued with congressional sanction or concurrence, they do not in any way impinge on the

rights or general legislative power of the State, or the rights of American citizens, nor can they serve as a basis for the control of their conduct.

The only congressional action on the subject since the Proclamation and since the *California* decision was the adoption of an amendment to a law extending the Federal Mineral Leasing Act to "heretofore or hereafter acquired" lands not then covered by the Act, which amendment specifically provided that the Act shall not apply to minerals in "submerged lands . . . or the continental shelf." This was at a time when it was well known to Congress that Texas and other States were regulating the exploration and conservation of minerals therein.

In *Skiriotes v. Florida*, 313 U.S. 69, 75 (1941), the Court said:

> "Congress having occupied but a limited field, the authority of the State to protect its interests by additional or supplementary legislation otherwise valid is not impaired."

It was Congress, and not the President, who had occupied but a limited field. To hold that the United States has as against Texas the exclusive interest in the resources claimed in plaintiff's brief, and that the President can extend the laws of the United States to cover such interest, is to hold that the President can by the issuance of a Proclamation make the doing of an act a trespass which was theretofore lawful. In the words of Lord Coke, "they [proclamations] cannot create any offense which was not one before." *Case of The Proclamations*, 77 Eng. Rep. 352 (1610). This the President plainly said that he did not even intend by his Proclamations.

The question of whether the United States should enter the field, restricting State action, is a political question for Congress to decide, and when it acts it can then adjust between the parties their equities, and the equities accruing to those who have discovered valuable deposits of resources under licenses issued by the State. This controversy, involving political questions, is of the nature in which this Court has refrained from acting or has declared beyond the jurisdiction of courts to decide. *Cf. Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948); *United States v. Palmer, 3 Wheat.* 610 (1818); *Coleman v. Miller*, 307 U.S. 433 (1939).

In no event has plaintiff shown such an exclusive interest against Texas as will support an injunction restraining Texas from preserving and regulating development of these lands and minerals until such time as Congress may act in a manner which conflicts with the action of the State.

*The Public Interest*

It would be against the public interest for the Court now to enjoin the State of Texas from its regulation and control of the resources involved. One of the moving forces behind the Presidential Proclamation was stated that

> ". . . the United States, . . . aware of the long-range world-wide need for new sources of petroleum and other minerals, holds the view that *efforts to discover and make available new supplies of these resources should be encouraged.* . . ."[93]

[93] 13 Dept. State Bull. at 485 (1945).

Those words were written almost five years ago. During that entire time the Congress has failed to enact legislation which would accomplish the encouragement of the discovery and availability of these resources. The State entered the field even before the Proclamation with legislation which not only encouraged the development but regulated it under sound conservation policies which prevent waste, pollution, and other harm to the waters, fisheries, and beaches. Some governmental authority should be allowed to continue with legislation and regulation in this field. It would not serve the public interests to permit individuals or corporations to operate therein without regulation and payment of rentals and royalties.

That such action as prayed for here is not in the public interest is best evidenced by the fact that the United States has not sued the individuals and corporations making the explorations on the lands, and neither have they stopped the development of private lessees nor the supervision, regulation, and leasing in the California marginal belt since the *California* decision in 1947. Although this Court held that the United States was entitled to an injunction, it was not issued because the "public interest" demanded continued development of the resources. Therefore, shortly after the *California* decision, the Secretary of the Interior, the Attorney General of the United States, and the Attorney General of California entered into a stipulation under which lessees holding State leases in California's marginal sea were permitted to continue operations and the State was allowed to continue leasing and collection of revenues

(impounding the State revenues in a special fund, but not the proceeds received by the lessees), pending congressional action or the entry of a final decree."[94] In transmitting this stipulation to the President the Attorney General wrote that such arrangement was necessary "to protect the public interest" and "to deal with such problems as could not await Congressional and further judicial action." He said further:

> "The opinion of the Supreme Court last June gave rise to a variety of unusually complex problems. The most pressing of these was the urgent need of assuring continued oil production in the coastal waters off California. Continued oil production was necessary in the interest of the United States. . . ."[95]

This agreement by federal officials who do not have control over United States property adds no validity to the operations of the State of California in the California marginal belt. If it is lawful and in the public interest for the State of California to continue its regulation, control, and leasing in the area covered by this Court's decision in the *California* case, it is by the same token lawful for Texas to continue similar actions in the area covered by this point.

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[94] Appendix B, Memorandum in Support of Proposed Decree, *United States v. California*, No. 12, Original, October Term, 1946, Appendix, p. 12.

[95] See Copy of letter from Attorney General Clark to President Truman, October 30, 1947, in Supplemental Statement and Brief for the State of Texas in Support of Objections to Motion for Leave to File Complaint, Appendix A, p. 33.

**f. In any event, Texas should not be prohibited from exercising its legislative power to "preserve and regulate the exploitation of an important resource" within its borders, in the absence of conflicting national legislation. See Toomer v. Witsell, 334 U.S. 385, 492 (1948).**

Even if it be assumed (contrary to what the evidence will show) that the land and minerals in suit are not owned by Texas, and that they are not owned by the United States, but that the United States has a paramount governmental right to preserve, regulate, and control their exploration and development, Texas is still free to act in the matter until Congress exercises the power of the Federal Government in a manner which conflicts with State legislation. See *Toomer v. Witsell*, 334 U.S. 385, 402 (1948).

If there is no ownership of the lands and minerals of the marginal belt, then there is no valid distinction, other than one of degree, between one natural resource and another. The right and power of the State, in the absence of national legislation, may be exercised as to oil as well as to fish. No claim is made that Congress has entered the field or attempted to exercise any paramount powers which may be held by the Federal Government over these resources.

In fact, as heretofore shown, Congress on several occasions, with full knowledge of the legislation and activities of this State and other States, has declined to enter the field. The only positive congressional action since the *California* decision has consisted of (1) the adoption of legislation specifically stating that the only federal mineral leasing law then in existence should not apply to the marginal belt and continental shelf (30 U.S.C. § 352; see footnote 85, p. 208); (2) House and Senate Judiciary Committee

reports and a House vote of 257 to 29 in favor of State ownership, regulation, and control of these lands and resources (See p. 171, *ante*), and (3) approval of a Gulf States Marine Fisheries Compact which recited that "The Gulf Coast states have the proprietary interest in and jurisdiction over fisheries in the waters within their respective boundaries." (Public Law 66, 81st Cong., 1st sess., ch. 128.)[*]

In *Skiriotes v. Florida*, 313 U.S. 69, 75 (1941) the Court ruled that the Florida statute as applied to conduct within the territorial waters of Florida *in the absence of conflicting Federal legislation*, was within the police power of the State. This was quoted with emphasis in *United States v. California*, 332 U.S. at 38, and again in *Toomer v. Witsell*, 334 U.S. at 393.

In support of the rule announced by Chief Justice Hughes in *Skiriotes v. Florida*, he cited (under "see also") among others his noted opinion in the *Minnesota Rate Cases*, 230 U.S. 353 (1913). The rule of the latter case is grounded in Chief Justice Marshall's opinion in *Gibbons v. Ogden*, 9 Wheat. 1 (1824). We are hardly at liberty to suppose that the Court in the *California* case or again in *Toomer v. Witsell*, in quoting from *Skiriotes v. Florida* intended to announce a departure from or a modification of a rule that is so deeply rooted in the jurisprudence of the nation. Under that rule, the National Government cannot exclude the State of Texas

[*] This bill was amended in the House to make certain that it was not intended to limit or add to the powers or proprietary interest of any signatory state. 95 Cong. Rec. 1875 (March 3, 1949).

from legislative jurisdiction by claiming superior governmental power, unless the power has been asserted by the legislative branch of the Federal Government.

The Texas legislation attacked by this suit is not challenged on the ground that it offends any Federal Constitutional limitation upon State power. Such was the basis of the attack upon the South Carolina statutes in *Toomer v. Witsell.* In the absence of such challenge, and since it is not claimed that the Congress has enacted conflicting legislation, the plaintiff is not entitled to prevail if it has no proprietary rights in the lands and minerals underlying the marginal belt within the original borders of Texas. Plaintiff has not shown such proprietary interest as a matter of law, and therefore the motion for judgment should be overruled.

The public interest and additional cases relating to this point are fully discussed in the preceding argument with reference to that part of the continental shelf lying outside of the State's original boundaries.

**2. SUMMARY OF FACTUAL CONCLUSIONS MADE BY PLAINTIFF AND THE CONTRARY FACTS WHICH DEFENDANT'S EVIDENCE WILL SHOW AT A FULL TRIAL.**

Plaintiff has attempted to raise fact issues on the value, claim, and use of these lands during and since the days of the Texas Republic; the customs and usages of nations as to the extent of boundaries and ownership of lands beneath the marginal belt; the intention of the parties to the Annexation Agreement; and many other issues which require that

plaintiff's motion for judgment on the pleadings be overruled in order that defendant may have an opportunity fully to develop its evidence. Defendant has listed many of the fact assumptions or conclusions relied upon by the United States in its brief. (See page 65 of Memoranda and Appendix included in this brief.)

The Court may take judicial notice of the status of international law and the practices of nations as to marginal sea boundaries and bed and subsoil ownership as it existed in 1836-1845, but since plaintiff disputes the status of this law and practice as claimed by defendant, it is proper that evidence be heard to determine the true practices, customs, and usages which comprised international law of the period. The Court often has gone to the publicists for this information, but the testimony of experts who have devoted their lives to the study of the practice is also proper. Defendant desires at trial to offer in support of its contentions some of the world's leading experts in the field of international law. In *Oklahoma v. Texas*, 253 U.S. 465, 471 (1920), a controversy as to the ownership of a riverbed in which the status of international law as of the years 1819, 1828, and 1838 was pertinent, this Court ordered that evidence be taken

> ". . . in respect of the governmental practice on the part of all governments and states concerned at the time, bearing upon the construction and effect of the said treaty."

Such a procedure is likewise necessary and appropriate in this case.

### 3. THE NATURE AND DISPUTED CHARACTER OF THE FACTS INVOLVED RENDER THEIR PRESENTATION AND DETERMINATION BY JUDICIAL NOTICE IMPOSSIBLE

As previously discussed under Point II, C, even if the plaintiff had set out the facts which it desired to have judicially noticed, the defendant would be entitled to show that they are disputable and to introduce controverting proof at trial. As a matter of law the defendant cannot present its case through judicial notice since obviously the basic facts in support of defendant's position are disputed by the plaintiff. And as a matter of fact, the defendant cannot do so since the nature and quantum of defendant's proof make it impracticable, if not impossible, to present its evidence fully in a logical and intelligible manner in its brief within the time allowed.

The majority of the facts included in plaintiff's brief have been shown to be disputable. The plaintiff in its brief has raised issues of fact as to the intention of the parties to the Annexation Agreement, the Convention of 1838, the treaty of Guadalupe Hidalgo, the treaties between Texas and different nations recognizing its independence, and various treaties and agreements. It has contended that the Republic of Texas did not claim ownership of the subsoil of the seabed within three marine leagues of its coast and that the customs and usages of nations in the period from 1836 to 1845 would not allow it effectively to do so.

The defendant has shown in this brief the nature of the basic facts upon which it relies to show the error of plaintiff's proposed conclusions of fact. In

addition to the material presented, the defendant has available a great amount of evidence bearing upon these facts. This material consists of diplomatic correspondence, congressional debates, histories, diaries, newspaper accounts, letters, maps, deeds, and oral testimony. The defendant has not had sufficient time, nor is it feasible, nor should it be required, to develop its evidence in such detail as to present the full factual basis of its case through the medium of a brief. Such a presentation cannot be made properly and effectively. It requires a trial for the coherent and complete development of all pertinent facts, followed by briefs and arguments directed to the trial record.

The State, as it has since the beginning of this case, desires to introduce this evidence. It also anticipated that plaintiff would necessarily rely upon fact issues, and defendant sought the most convenient and efficient means of developing a record for appellate or original review by this Court. When Texas opposed the motion for leave to file the complaint, it asked that the motion be overruled without prejudice to the filing of the complaint in a district court.[97] Assuming that this Court did not have the time to hear the evidence *en banc*, defendant suggested that it could be developed with greater convenience and efficiency in a district court.[98] If the Court should decide such a course to be desirable, we

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[97] Federal district courts were given concurrent jurisdiction of all cases between the United States and a State by revised Title 28, U.S.C., § 1251, § 1345.

[98] See Supplemental Statement and Brief for the State of Texas in Support of Objections to Motion of the United States for Leave to File Complaint, April, 1949, pp. 23-32.

agree that the pleadings may be forthwith filed in a district court, and that the case be then considered at issue so that it would be able to proceed promptly to trial.

On the other hand, if the Court deems appointment of a special master more advisable, Texas will be ready to proceed promptly before him. When Texas filed its answer on November 8, 1949, it filed therewith a motion for appointment of a master. This motion is still before the Court, presumably pending the determination of the motion for judgment.

**E. The Established Practice of this Court in Original Actions, and for Federal District Courts, Allows Full Development of All Factual Issues.**

*Practice of This Court in Original Actions*

This Court has held that the more important the case and the more impacts to be expected from its decision, the more inappropriate is the case for the application of summary procedure. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948); *Eccles v. Peoples Bank of Lakewood Village, Cal.*, 333 U.S. 426 (1947). As far as we can ascertain, the case at bar involves the largest area of land ever the subject of litigation before an American court. It calls for adjudication of the intention of two independent nations in making an agreement of union. It involves lands claimed, possessed, used, and enjoyed by the defendant for over 100 years in accordance with its understanding of the agreement, and without previous dispute by the plaintiff.

In the exercise of its original jurisdiction this Court has consistently allowed a defendant State full and adequate opportunity to develop its defenses, including the submission of evidence, at a trial for that purpose. This Court has fully appreciated that in exercising its original jurisdiction it sits as a *nisi prius* court of last resort, and that in the proper discharge of its duties it must examine the case with scrutinizing care and caution after it has allowed full and thorough development. This Court has zealously guarded against action which might prejudice the high parties before it. In *Kansas v. Colorado*, involving conflicting State claims to rights in an interstate stream, this Court in ruling on a demurrer to the bill, held that it would not compel amendment "whatever imperfections a close analysis of the pending bill may disclose," nor would it "proceed on the mere technical admissions made by the demurrer," but would overrule the demurrer so that the case could go to issue and proofs. 185 U.S. 125, 144, 145, 147 (1902). Chief Justice Fuller stated:

> "Applying the principles settled in previous cases, we have no special difficulty with the bare question whether facts might not exist which would justify our interposition, while the manifest importance of the case and the necessity of the ascertainment of all the facts before the propositions of law can be satisfactorily dealt with, lead us to the conclusion that the cause should go to issue and proofs before final decision.
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> "
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> ". . . 'A demurrer will lie wherever it is clear that, taking the charges in the bill to be true, the bill would be dismissed at the hear-

ing; but it must be founded on this: that it is an absolute, certain, and clear proposition that it would be so; for if it is a case of circumstances, in which a minute variation between them as stated by the bill, and those established by the evidence, may either incline the court to modify the relief or to grant no relief at all, the court, although it sees that the granting the modified relief at the hearing will be attended with considerable difficulty, will not support a demurrer.'

"Advancing from the preliminary inquiry, other propositions of law are urged as fatal to relief, most of which, perhaps all, are dependent on the actual facts. The general rule is that the truth of material and relevant matters, set forth with requisite precision, are admitted by demurrer, but in a case of this magnitude, involving questions of so grave and far-reaching importance, it does not seem to us wise to apply that rule, and we must decline to do so.

". . .

"The result is that in view of the intricate questions arising on the record, we are constrained to forbear proceeding until all the facts are before us on the evidence."[99]

The principles of liberality here applied were earlier stated in the boundary action between *Rhode Island v. Massachusetts* as follows:

". . . in a controversy where two sovereign states are contesting the boundary between them, it will be the duty of the court to mould the rules of chancery practice and pleading, in such a manner as to bring this case to a final hearing on its real merits. It is too important

[99] *Kansas v. Colorado*, 185 U.S. 125, 144, 145, 147 (1902).

in its character, and the interests concerned too great, to be decided upon the mere technical principles of chancery pleading. . . . And in a case like the present, the most liberal principles of practice and pleading ought unquestionably to be adopted, in order to enable both parties to present their respective claims in their full strength."[100]

In *Iowa v. Illinois* the Court said:

"In the exercise of original jurisdiction in the determination of the boundary line between sovereign states, this court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which full opportunity to be heard has not been afforded."[1]

Chief Justice White said in *Virginia v. West Virginia*:

"As we have pointed out, in acting in this case from first to last the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between States, involving grave questions of public law, determinable by this Court under the exceptional grant of power conferred upon it by the constitution, has been the guide by which every step and every conclusion hitherto expressed has been controlled, and we are of the opinion that this guiding principle should not now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of as come ultimately it must, in the absence of

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[100] 14 Pet. 210, 257 (1840).

[1] 151 U.S. 238, 242 (1894) (vacating the Court's order confirming the report of commissioners).

agreement between the parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice after the amplest opportunity to be heard, has in any degree entered into the disposition of the case."[2]

The guiding principles of these decisions have been applied, whether the action be by the United States against a State or by a State against another State, to the end that all parties have been given full and fair opportunity to develop their claims and defenses, including the taking of testimony where that was desired. Thus in the prior boundary dispute between the United States and Texas proof was taken where the history of the period had a bearing on the decision. *United States v. Texas*, 143 U.S. 621 (1891) and *United States v. Texas*, 162 U.S. 1 (1896). When the United States sued to quiet title to land in Oregon, according to the opinion "voluminous testimony" was taken by a special master. *United States v. Oregon*, 295 U.S. 1 (1935). Similarly, in an action by the United States to quiet title to the beds of rivers in Utah, this Court appointed a special master, documentary evidence was introduced, and both parties presented the oral testimony of numerous witnesses as to the topography of the rivers, their history, etc. *United States v. Utah*, 283 U.S. 64 (1931).[3] When the United States sued to

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[2] 234 U.S. 117, 121 (1914). The extreme forbearance and care with which the Court proceeded in the Virginia-West Virginia litigation is common knowledge.

[3] For a list of the numerous witnesses on both sides, see the index of Utah's reply brief.

establish title to certain land in Wyoming and to proceeds of the oil taken therefrom, a special master to hear testimony was appointed. *United States v. Wyoming*, 331 U.S. 440 (1947).

Likewise, when States have come to this Court in disputes with another State, evidence has been taken, when offered, to explain and develop either the claim or defense. In a boundary suit between Vermont and New Hampshire this Court appointed a special master and said that it considered the history of the subject from the creation of New York and New Hampshire as adjoining royal provinces to the admission of Vermont as a State and also the subsequent acts and claims of Vermont and New Hampshire respecting the subject down to the present time. *Vermont v. New Hampshire*, 289 U.S. 593 (1933). In a boundary dispute between Louisiana and Mississippi, the history of the subject was considered, and the Court stated:

> "The cause being at issue, much evidence, documentary and otherwise, was taken . . ." *Louisiana v. Mississippi*, 202 U.S. 1, 21 (1906).

Similarly, evidence was taken in a boundary dispute between the States of Arkansas and Mississippi. *Arkansas v. Mississippi*, 256 U.S. 28 (1921). In *Oklahoma v. Texas*, involving a controversy as to the ownership of a river bed wherein oil and gas had been found, the United States was allowed to intervene, and the Court ordered that evidence be taken "in respect to the governmental practice on the part of all governments and States concerned at the time

bearing upon the construction of the treaty." 252 U.S. 372 (1920); 253 U.S. 471 (1920); 260 U.S. 606 (1923).

In a boundary dipute between Indiana and Kentucky both States used aged witnesses. *Indiana v. Kentucky*, 136 U.S. 479, 509 (1890). Likewise, in a suit to determine the ownership of the bed of the Delaware River and the boundary between Delaware and New Jersey, a special master was appointed. *New Jersey v. Delaware*, 291 U.S. 361 (1934). A special master was appointed and testimony taken on a boundary question involving Michigan and Wisconsin. *Michigan v. Wisconsin*, 270 U.S. 295 (1926). When North Dakota sought to enjoin Minnesota from the use of certain drainage ditches, the testimony of witnesses, including farmers and engineers, was taken. *North Dakota v. Minnesota*, 263 U.S. 365 (1923). In a boundary dispute based on a sudden change in 1821 of the course of the Mississippi River, a special master was appointed who took testimony and received other evidence. The history of the subject matter was deemed important as an aid in the determination of the case. *Arkansas v. Tennessee*, 310 U.S. 536 (1940). Similarly, testimony was taken in *Texas v. Florida*, 306 U.S. 398 (1939), to determine the domicile of a decedent for inheritance tax purposes.

We have been able to find only four original proceedings involving States which have gone to judgment without a trial for the purpose of taking evidence. *United States v. North Carolina*, 136 U.S. 211 (1890), an action of debt on state bonds, came on for hearing upon facts stipulated by the parties; in *Iowa v. Illinois*, 147 U.S. 1 (1893), 151 U.S. 238 (1894), 202 U.S. 50 (1906), a commission to deter-

mine a boundary was appointed after the facts were admitted; and in *United States v. Minnesota*, 270 U. S. 181 (1926), a suit to cancel land patents, the parties voluntarily submitted their case on pleadings and documentary evidence. This was equally true in *United States v. California*, 332 U.S. 19 (1947), involving title to the lands offshore the coast of California. In its own words, defendant California included within its brief a "presentation of its entire case, both upon the law and the facts." (Foreword, Defendant's Brief, *United States v. California.*) This is a feat which, because of the extent and nature of its evidence, the State of Texas has insisted from the beginning, and now shows the Court it cannot accomplish through the medium of a brief. See p. 225 et seq., *infra.* Further, it has moved this Court, and the motion pends, for leave to take oral depositions of certain aged witnesses whose testimony is relevant to the issues in this case. Furthermore, as we point out in detail under the discussion of Judicial Notice, *ante*, there is a vast amount of other relevant testimony which Texas desires to offer in connection with the use of the lands in question during the time it was a Republic and subsequent thereto, diplomatic correspondence, testimony of experts on international law, and related proof relative to the Annexation Agreement and other issues in this case. Mr. Justice Black, who spoke for the Court in *United States v. California*, and who has long championed the right of all defendants to a full and fair trial, carefully pointed out:

> "Neither [the United States nor California] has suggested any necessity for the introduction of evidence. . . ." *United States v. California*, 332 U.S. 19, 24.

In summary, the only instances in which a trial has been dispensed with in an action involving this Court's original jurisdiction have been where the taking of evidence was unnecessary because of stipulation or agreements as to the facts or evidence and there was no objection or intimation by the defendant State that it desired a hearing for the purpose of taking evidence.

*Practice in Federal District Courts*

The practice which this Court has established for the *nisi prius* district courts is in point, for in the case at bar this Court sits as a *nisi prius* court. A motion for judgment on the pleadings is denied unless it is certain that there is no issue of fact, and any doubt as to the existence of such an issue is resolved against the moving party; and on a motion for summary judgment based on matters dehors the pleadings, the motion is denied unless it is indisputably clear that there is no genuine fact issue.[4] Both motions are harsh in that they foreclose any development of the factual issues at trial. These are elementary principles for the disposition of litigation involving only private matters. In cases that involve public issues that are large or complex, this Court has gone further and expressly cautioned against any summary disposition. Thus, in *Eccles v. Peoples Bank of Lakewood Village, Cal.*, 333 U.S. 426, 434 (1947), Mr. Justice Frankfurter stated:

> "Caution is appropriate against the subtle tendency to decide public issues free from the

[4] See pp. 43 et seq., *supra*.

safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment."

And in *Kennedy v. Silas Mason Co.* Mr. Justice Jackson spoke for the Court as follows:

". . . No conclusion in such a case should prudently be rested on an indefinite factual foundation. But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.

"We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide." 334 U.S. '249, 256-257 (1948).

Since the Court has consistently refused to allow an original action to be decided on the pleadings without the consent of the parties and has established a similar rule for the district courts in cases of public import, we feel that in a case of this magnitude and of such public importance the Court

should overrule the plaintiff's motion for judgment or, in the alternative, should defer its disposition in accordance with the principles to which we now turn.

## III. Because of the Importance of this Case and the Related Fact Issues, If the Motion for Judgment Is Not Now Overruled, Its Disposition Should Be Deferred Until The Evidence Is Fully Developed.

As previously discussed, under the consistent and established practice of this Court for cases involving its original jurisdiction, this Court has allowed full and complete development of all issues and has refused to subject pleadings to technical scrutiny to the end that the case could go to issue and proofs. In other words, this Court has denied or deferred to trial motions of the character now presented by plaintiff.

"We arrive at the same end if the principles of the prior equity practice or those of the present Federal Rules of Civil Procedure are applied. Under the prior equity practice the court said, in *Dixon v. Hopkins*,

> "Federal Courts are inclined, without subjecting the bill to an overcritical or minute analysis, to allow a case in equity involving important matters to go to issue and proof where a doubtful question is raised by the pleadings."[5]

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[5] 56 F. 2d. 783, 784 (C.C.A. 5th, 1932), citing *Krouse v. Brevard Tannin Co.*, 249 Fed. 538 (C.C.A. 4th, 1918); *American Creosote Works v. Powell*, 298 Fed. 417, 422

Under the present Federal Rules, Rule 12(d) authorizes a district court to order that the hearing and determination of defensive motions and a motion for judgment on the pleadings be deferred until the trial. As that rule is applied, a district court, if the present action were there pending, would defer determination of the issues in this case until trial.

> "Certainly it will be advisable generally to decide such defenses as lack of jurisdiction over the subject matter, lack of jurisdiction of the person, improper venue, insufficient process or service of process, or failure to join an indispensable party, promptly after they are raised, and not defer them to the trial. On the other hand, where determination of the defense will involve going into the merits, the question may well be reserved until trial. The rule is not intended to permit 'fragmentary and separate trials of issues that require coherent presentation for their just determination.'
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> "
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> "It will often occur that the court feels that issues raised by a motion to dismiss for failure to state a claim under (b)(6), or by a motion for judgment on the pleadings, are of such grave consequence that it is better not to decide them without full consideration of all the facts that can be adduced at trial."[6]

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(C.C.A. 5th, 1924), cert. den. 265 U.S. 595 (1924); *Kansas v. Colorado*, 185 U. S. 125 (1902). Other representative cases prior to Federal Rules: *O'Keefe v. City of New Orleans*, 273 Fed. 560 (E.D. La. 1921), aff'd 280 Fed. 92 (C. C. A. 5th, 1922); *Shredded Wheat Co. v. Kellogg Co.*, 26 F. 2d 284 (D. Conn. 1922).

[6] 2 Moore's Federal Practice (2d ed.), ¶ 12.16, pp. 2274 2275. *Accord* in principle, 5 Cyclopedia of Federal Procedure (2d ed.) § 1783.

This Court has held that where the determination of a motion to dismiss would raise grave constitutional issues, the motion should be deferred until trial. *Gibbs v. Buck*, 307 U.S. 66 (1939); *Polk County v. Glover*, 305 U.S. 5 (1938). Where plaintiff sued to enjoin the collection of the social security tax and defendant moved to dismiss on the ground that injunctive relief was prohibited by the Internal Revenue Act, the determination of the motion was deferred until the trial on the merits. *Kaus v. Huston*, 35 F. Supp. 327 (N. D. Iowa 1940). The court stated:

> "In considering this question the matter of procedure is first thrust upon the court. It is contended by the defendant that the court is obligated to rule upon its motion to dismiss without proceeding to a trial upon the merits. I think in this respect counsel for the defendant fails to appreciate that in the instant case the question presented by the motion and the so-called merits of the case are identical. . . . Rights of action as set forth in pleadings are not always so definite and inclusive as to preclude the necessity of further light from the evidence, hence, this Rule [12(d)] I think is intended to permit the court to take a larger scope of vision than that merely stated in the pleading." 35 F. Supp. 327, 330.[7]

[7] For other cases in accord, see *Equitable Life Assurance Society v. Kit*, 26 F. Supp. 880 (E.D. Pa. 1939) (motion for judgment on the pleadings, raising question as to effectiveness of attempted change of beneficiary, deferred until trial); *Montgomery Ward & Co. v. Schumacher*, 3 F.R.D. 368 (N.D. Cal. 1944) (question of law novel; damages sought were large); *Sbicca-Ded Mac, Inc. v. Milins Shoe Co.*, 36 F. Supp, 623 (D. Mass. 1940); *Liquid Carbonic Co.*

That the case at bar presents a situation within the purview of Rule 12(d) is clearly apparent from the brief filed herein by plaintiff on February 20, 1950. There can be no doubt that plaintiff's brief presents argument on every major point which would be considered in a full hearing on the basis of fact and law. It is certain that plaintiff has not separated its law arguments from its arguments of fact, and, as we have pointed out, it is unlikely that it could have done so. The State of Texas believes that in line with the prior practice of this Court, the practice of other Federal Courts, and the important issues of fact and law evident from the pleadings and the plaintiff's brief, and further pointed out in this brief, the Court should now overrule the motion for judgment, or, in the alternative, defer consideration of the issues raised thereby until trial.

## CONCLUSION

Plaintiff's motion for judgment should now be denied, and the case should go to trial for the presentation of all pertinent evidence. If not denied, determination of the motion should be deferred.

Defendant's pending motion for the appointment of a master should be granted, unless the Court now deems a district court to be a more convenient and appropriate forum for trial, in which event the de-

*v. Goodyear Tire & Rubber Co.*, 39 F. Supp. 520 (N.D. Ohio, 1940); *Banks v. King Features Syndicate, Inc.*, 30 F. Supp. 352 (S. D. N.Y. 1939); *Park In Theaters, Inc. v. Paramount-Richards Theatres, Inc.*, 81 F. Supp. 466 (D. Del 1948); *Hawn v. American Steamship Co.*, 26 F. Supp. 428 (W.D. N.Y. 1939); 2 Moore, *op. cit. supra*, ¶ 12.16; 5 Cyc., *op. cit. supra*, ¶ 1783.

fendant agrees that the pleadings may be forthwith filed in a district court, and that the case be then considered at issue so that it way proceed promptly to trial in the district court.

Respectfully submitted,

Price Daniel

PRICE DANIEL
*Attorney General of Texas*
JESSE P. LUTON, JR.
J. CHRYS DOUGHERTY
K. BERT WATSON
DOW HEARD
WALTON S. ROBERTS
CLAUDE C. MCMILLAN
FIDENCIO M. GUERRA
MARY K. WALL
*Assistant Attorneys General*

ROSCOE POUND
JOSEPH WALTER BINGHAM
MANLEY O. HUDSON
JAMES WM. MOORE
*Of Counsel.*

March 25, 1950

## Rights Involved In United States v. Texas

BY ROSCOE POUND

I shall treat the rights involved here as within the terms of ownership or proprietary rights *(dominium)* as distinguished from governmental powers of regulation and control *(imperium)*.

The rights in controversy constitute proprietary substance whether described by the term "ownership" or "paramount rights." At issue is the ownership of the subsoil resources and minerals "underlying" the waters of the Gulf of Mexico within the boundaries of Texas or the right to develop, use and dispose of them for profit.

There is no controversy over the waters or the governmental power to regulate, conserve, or control their use, or the use of the sea bed and subsoil, to insure against interference with public rights of navigation and constitutional federal powers. These governmental powers are *imperium* over the waters and submerged lands. They are paramount to but distinguishable and separable from proprietary rights in the subsoil.

To remove all doubt about the nature of the rights claimed, the United States refers to them as full ownership or dominion, or

> "whatever is the most accurate description of the right to take and enjoy the complete benefit of the mineral and other resources of the bed of the sea." (Plaintiff's brief, p. 16.)

There is no need for a more accurate description than "ownership," although the ownership may be qualified and limited by reason of the paramount governmental powers which relate to the overlying waters and with which exercise of the ownership and

use of the underlying subsoil must not conflict.

According to the civilians, *dominium* includes *jus possidendi* (a right of possessing), *jus utendi* (a liberty of using), *jus fruendi* (a liberty of enjoying the profits and avails), *jus abutendi* (a liberty of destroying), *jus disponendi* (a power of disposing of the thing owned), and *jus prohibendi* (a right of excluding others). Hearn, *Theory of Legal Duties and Rights*, Chap. 10, § 1, p. 186 (1883). The right to take or liberty of taking minerals from below the surface is an incident of ownership—of *dominium*. At common law the taking of minerals from below the surface is called a profit. It is an exercise of the owner's liberty of enjoying the land. The civilians put it as an exercise of his *jus fruendi*.

*Dominium* or ownership is the description applied by substantially all jurists and publicists since the seventeenth century to denote the sovereign's original right to the subsoil underlying the marginal sea belt with its territory. (See chronological list of these writings from 1670 to 1950 in Appendix to this brief.)

This *dominium* ("complete benefit of the mineral and other resources of the bed of the sea") is to be distinguished from the sovereign's *imperium* (right to regulate, control, police, and conserve) in the overlying waters and its prevention of conflict between the owner's use of the bed and the public interests of navigation, safety, health, peace, order, and morals.

This distinction between the sovereign's *imperium* over and *dominium* in the marginal sea belt is also recognized by substantially all publicists since the seventeenth century. (See chart in Appendix.) It is recognized in other property possessed by governments for public purposes, e. g., highways and rivers.

I have said that a government has *imperium* over this nature of public property rather than *dominium*. That is because a government cannot possess, dispose of, or use to the exclusion of its citizens either a public highway or the waters of its rivers and seas. It has on the highway proper, and in the waters, governmental rights of regulation, control, and conservation. But beneath the surface of the highways held in fee by a government and beneath the waters of rivers and marginal sea belts lie subsoil and minerals which can be possessed, used, enjoyed, produced, and disposed of by the sovereign for profit—so long as its actions do not interfere with the public rights in the easements above. Minerals are produced from these subsoils by tunneling and slant drilling without disturbing public uses of the roads and waters. The right to take and enjoy the complete benefit of these subsoil minerals is *dominium* severable and distinct from the paramount *imperium*. The proprietary rights of *dominium* are merely limited by and subject to the governmental *imperium*, with which they must not interfere.

The marginal bed of the sea and beds of navigable waters furnish the best examples of the distinction between the original *imperium* and *dominium* of a sovereign. Even when the rights obtain concurrently, the *imperium* is paramount for the protection of public interests. In the common law the king was said to have a *jus publicum* in navigable waters for the protection of the public rights and interests and a *jus privatum*, which was his own private proprietary right to the resources of the bed and subsoil.

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[1] Pound, *An Introduction to the Philosophy of Law*, 198-199 (1922). Reference was made to these pages by Mr. Chief Justice Vinson in a case involving South Carolina's rights over free-swimming fish in the waters of the marginal sea of that State. *Toomer v. Witsell*, 334 U.S. 385, 402 (1948). When the Court in that case said that "ownership" as applied to free-swimming fish is only a fiction expressive of "the power to preserve and regulate the exploitation of an important resource," it drew the distinction applicable here. Had the Court been referring to the right of the State or of the United States to take or make beneficial use of the subsoil minerals for profit, or even a right of exclusive disposition of the fish for profit, "ownership" would have been a correct descriptive term. Taking, using, and disposing for profit involves more than conservation and regulation. The former is *dominium* and the latter, *imperium*.

This rule was recognized by the Supreme Court of the United States in *Shively v. Bowlby*, 152 U.S. 1, 13 (1894):

> "In England, from the time of Lord Hale, it has been treated as settled *that the title in the soil of the sea*, or of arms of the sea, below ordinary highwater mark, *is in the King*, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage; (citing cases) and that this title, *jus privatum*, whether in the King or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing." (Emphasis supplied.)

The king's *jus privatum* in the bed and subsoil is distinguishable from the *jus publicum* which was an attribute of sovereignty. The former is *dominium*, the latter *imperium*. The two are not concurrent and inseparable. Thus in *Gammell v. Commissioners of Woods and Forests*, 3 Macq. (Scotland) 419 (1859), decision of the Court of Session affirmed by House of Lords of Great Britain, it was held that the right of the crown in the marginal seas around the seacoast of Scotland "is not to be regarded simply as an attribute of sovereignty, but rather as a *patrimonium*, a beneficial interest constituting part of the regal hereditary property." Hence it was said that the crown could grant estates in it—in particular parts of it. Note here that the crown cannot alienate its sovereignty but can alienate its patrimony, i. e., its property, that in which it has *dominium*. *Id.* at 458 ff. Such alienations by grant are cited with reference to the records in *Duchess of Sutherland v. Watson*, 6 Session Cases (Scotland)

199, 203 (1868). The sovereign cannot give up its *imperium* and remain sovereign.

Common-law lawyers and civilians have been agreed as to the nature of the right of the crown with respect to the bed and subsoil of the marginal sea. Lord Cranworth said of the proposition that the crown had a property right as well as *imperium*: "Nobody doubts that such a right exists." *Gammell v. Commissioners of Woods and Forests*, 3 Macq. 419, 465 (1859). Erskine pointed out that as a consequence of *dominium* in the crown "treasures brought up from the bottom of these [i. e., the marginal] seas belong to the crown." Erskine, *Principles of the Law of Scotland*, ii, 1, 6 (1754).

In *Lord Advocate v. Trustees of Clyde Navigation*, 19 Session Cases 174 (1891), in the opinion of the Lord Ordinary (affirmed by the whole court on appeal) it is said:

> "I am of opinion . . that there is no distinction in legal character between the Crown's right in the foreshore, in tidal and navigable rivers, and in the bed of the sea within three miles of the shore. In each case it is of course a right largely qualified by public uses. In each case it is therefore to a large extent *extra commercium* [i. e., so far as it is accompanied by *imperium* the latter is not alienable]; but none the less *is it, in my opinion, a proprietary right*—a right which may be the subject of trespass, and which may be vindicated like other rights of property.
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> "Such, I consider, is the result of all the best authorities—Scotch, English, and foreign.
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> "It is the doctrine of Craig, Stair, Erskine, and Bell—(Craig, i.13, p. 140; Stair, ii.1, 2; ii.1, 5; Ersk. ii.1, 6; ii.6, 13; Bell, 639). It is

> the doctrine of Seldon and Hale, of Grotius and Vattel—(Grotius, ii.2, 13; Vattel, i.23; Puffendorf, iv.2, 6; . . .) and it has been affirmed on many occasions by high judicial authorities both in Scotland and England. It has also received practical effect in various judgments with respect *inter alia* to *mineral under the sea*. . . ." (Emphasis supplied.) *Id.* at 177.

These cases and the authorities they cite show that *dominium* as to the foreshore and as to the bed of the marginal sea is exactly the same and quite independent of *imperium* although they may co-exist. The *dominium* may be granted by the crown. The *imperium* cannot.

The distinction between rights in waters of the sea and the subsoil minerals is nowhere better demonstrated than in the Roman and Spanish law of the eighteenth and early part of the nineteenth centuries. During that time certain civil law countries, including Spain and Mexico, held to the doctrine that the foreshore and marginal sea was an unowned common. Yet, as to precious stones therein and as to mines and minerals thereunder, the sovereign's separate ownership applied the same as under all other lands within the realm. This point is developed fully in the State's brief. Suffice it to say here that the separate mineral ownership of the sovereign in Spanish and Mexican law, which later became the law of the Republic of Texas, was clearly severable from the public rights and governmental powers in the marginal sea. It was a *dominium* which could pass from the sovereign to an individual or another State only by specific grant or cession, neither of which was made by Texas to the United States upon admission to the Union. In addition to the separate

mineral ownership under its adopted Spanish-Mexican law, Texas adopted the common law as to ownership of the bed and subsoil of the marginal sea within its boundaries in 1840.

Thus as an independent nation the Republic of Texas owned the bed and subsoil and a separate estate in the minerals in that portion of the Gulf of Mexico within its boundaries. It had *dominium* of this property as well as the *imperium* of a sovereign nation. The two rights were severable. Its national sovereignty and all governmental powers attached thereto could be transferred with or without its minerals and subsoil ownership. One must look to the treaty or agreement by which it transferred its national sovereignty to determine whether there was also a cession of property rights.

Herein lies the vital distinction between the *Texas* case and that of *United States v. California*, 332 U.S. 19 (1947).

California never was an independent sovereignty with both *imperium* over and *dominium* in a public domain! It had no public domain of its own. The United States succeeded to both *imperium* and *dominium* with respect to the whole domain of California.

*Pollard v.* ***Hagan***, 3 How. 212 (1845) is likewise to be distinguished. It held that by the Florida treaty the United States did not succeed to those rights in Florida which the King of Spain had held by virtue of his royal prerogative, but acquired and possessed the territory subject to the institutions and laws of its own government. Florida was never an independent sovereign. Alabama was acquired by cession from Virginia, Georgia, and France, subject

to trusts created by the cessions. The United States holds public lands in the States formed from territory derived from these cessions by virtue of the cessions, and the constitutional power of Congress as to the territory and other property of the United States. Accordingly, those States have *imperium* for all but federal purposes over the whole domain within their boundaries including the foreshore. As to *dominium*, where the United States acquired it by cession, it is independent of the *imperium*.

Also *Shively v. Bowlby*, 152 U.S. 1 (1894) is to be distinguished. The title of the United States to Oregon is based on discovery. So the United States had from the beginning the public domain; it had both *imperium* and *dominium*. Oregon had and has only what the United States by its constitution and laws conferred on that State. It had no independent public domain of its own. In *United States v. California* the Court holds that it will not apply what was held in these cases as to the effect of admission to the Union on an equality with the original thirteen States beyond inland waters.

Texas is in a wholly different position since the *dominium* of the Republic of Texas to the full extent of the public domain was recognized and reserved, and it extended to the *dominium* of that Republic over the bed and subsoil of coastal no less than of inland waters and hence to the minerals beneath the bed of the marginal belt of the sea within the boundaries of the Texas Republic.

The subsoil below the bed of the marginal sea adjacent to the coast of Texas and within its boundaries was part of the public domain of Texas. It was claimed by the Republic of Texas after es-

tablishing its independence and has been claimed and possessed by Texas ever since. Even if Lauterpacht's doctrine of acquisition of *dominium* over what is beneath the bed of the open sea by occupancy is adopted, the Republic of Texas so acquired it. Bringing the area within its fixed boundaries with possession maintained from shore and by its navy, exclusive use of the *fundum* and *maritima incrementa* gave the Republic constructive as well as actual occupancy.

In *United States v. California* the Court found that the original thirteen States did not separately acquire the lands beneath their marginal belts before the Union was formed. The Court said "any acquisition, as it were, of the three-mile belt [has] been accomplished by the National Government," and no transfer of proprietary rights had been made to those States or to California.

Quite differently from what the Court found with reference to the original States, the Republic of Texas did acquire its three-league marginal belt before it entered the Union. It did so in the same manner as the United States was held to have acquired the marginal belt off the shores of the original States —by extending national dominion thereover. In addition, Texas established and maintained fixed boundaries and brought the area within and subject to a body of domestic law which fixed ownership of the bed, subsoil, and minerals in the Republic.

At annexation Texas transferred only governmental powers, *imperium*, over its territory for federal purposes as granted by the Constitution. The United States acquired no *dominium* over lands in Texas except as acquired by cession or condemnation subsequent to annexation.

Texas' ownership cannot be exercised in such manner as to interfere with any federal governmental power which exists over the area. To that extent it is a limited and restricted ownership. The federal powers in national defense, commerce, and international relations are paramount. As said in the *California* case, they transcend the rights of a mere property owner. But they do not extinguish the rights of the property owner. They limit and restrict the owner's enjoyment only when necessary in the exercise of the transcending governmental powers. As on the Great Lakes, which have been held to be "open seas"[2] and beneath which far greater areas of submerged lands have been held to be owned by the States,[3] the United States may regulate navigation, make international agreements, and conduct the public defense, without owning the lands.

Wisely, the plaintiff does not contend that ownership of these lands and minerals is an inseparable attribute of external sovereignty. In this day when world governments are being planned it is important that *dominium* is not confused with or inextricably tied to *imperium*. Imagine a day when the governments of the world might join in an effective union. Assume that all of this nation's powers of external sovereignty, international relations, and defense were transferred to a United Nations of the World. This transfer of external sovereignty should not be held to carry with it any proprietary rights theretofore acquired by the United States in the marginal belt of the original States and California in the absence of a cession of the property.

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[2] United States v. **Rodgers, 150 U. S. 249 (1893).**

[3] Illinois Central Railroad Co. v. Illinois, 146 U. S. 387 (1892).

Such is the situation which existed between Texas and the United States in 1845. Texas transferred its external sovereignty and certain enumerated properties which then pertained to its national defense. It ceded no other property. This is confirmed by a specific reservation of all "vacant and unappropriated lands lying within its limits." The subsoil and minerals remained in the State just as the subsoil and minerals of the California belt would remain in the United States if it should transfer external sovereignty to a larger federation of States without ceding its rights of a proprietary nature beneath the marginal sea of California.

The rights are separable and it was wholly within the power of the Congress of the United States to make the agreement allowing Texas to retain its marginal sea lands and minerals at the time national sovereignty was transferred. This is confirmed by a reference in the *California* decision concerning the power of Congress to prevent the Attorney General from bringing the California suit. There the Court said:

> "For Article IV, § 3, Cl. 2 of the Constitution vests in Congress 'Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' We have said that the constitutional power of Congress in this respect is without limitation. *United States v. San Francisco*, 310 U.S. 16, 29-30. Thus neither the courts nor the executive agencies, could proceed contrary to an Act of Congress in this congressional area of national power."

## MEMORANDUM ON UNITED STATES v. TEXAS

### Inapplicability of the California Case, 332 U. S. 19.

BY CHARLES CHENEY HYDE*

The *California* decision was based upon a conclusion of the Court that the thirteen original States did not in fact own their marginal belts below low water mark, whatever those belts might embrace. It is unnecessary here to question the soundness of that conclusion. Texas simply asserts that it did in fact as an independent country acquire and gain title to the minerals and submerged lands within its territorial limits, and that the title to those lands has not been transferred to the United States.

The Supreme Court of the United States was not confronted with such a factual situation in the *California* case. In that case the Court did not in fact undertake to pass upon the meaning or interpretation of a title acquired by any political entity or State of the Union prior to its entering the Union to underlying lands of the marginal belt. In the present case, the outstanding factor is the definite assertion of title by Texas to lands underlying the sea over the area which it claimed to be its own, embracing an extent of three marine leagues from low water mark.

The evidence of that assertion within those limits is clear. The claim does not necessarily involve any

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* Author of *International Law Chiefly as Interpreted and Applied by the United States*, 3 vols. (1945); former Solicitor for the Department of State under Secretary Hughes and Secretary Kellogg; Professor of International Law and Diplomacy at Columbia University, 1925-1945; President of the American Society of International Law, 1946-1949.

right to the water or use of the water superjacent to the soil.

Texas had made it clear that within the territorial limits referred to, it was a sovereign State asserting in an international sense exclusive control of areas therein, and embracing also ownership over all lands and rivers of every kind within the same limits. These assertions were apparent in the Texan statutory law during the period of its independence, also in the terms on which it was admitted to statehood in the United States, and in the provisions in certain subsequent treaties.

Let us take a look at the assertions of Texas with respect both to the extent of the territorial areas involved, and to the relation to itself of the area claimed.

On December 19, 1836, Texas enacted a law, announcing that its boundary beginning with the mouth of the Sabine River ran "west along the Gulf of Mexico three marine leagues from land, to the mouth of the Rio Grande";[1] and it maintained throughout its life as an independent nation its dominion over this area. The territory "properly included within, and rightfully belonging to the Republic of Texas,"[2] was admitted into the Union and became the new State of Texas by two joint resolutions of the federal Congress coupled with one joint resolution by the Congress of the Republic of Texas. To

[1] Act of December 19, 1836, John and Henry Sayles, *Early Laws of Texas*, vol. 1, art. 257.

[2] S. A. Risenfeld, *Protection of Coastal Fisheries under International Law*, Washington, 1942, p. 259, citing Joint Resolution of Congress of March 1, 1845, 5 U. S. Stats. 797, and Act of December 29, 1845, 9 U. S. Stats. 108.

quote a careful observer, "it would seem to follow from the three joint resolutions mentioned above that the gulf boundary of Texas runs at a distance of three leagues from the Gulf coast."[3] Again it is not without significance that the Government of the United States, doubtless influenced by the territorial extent of the Texan territory, utilized the same in its treaty of Guadalupe Hidalgo concluded with Mexico, February 2, 1848,[4] and in the Gadsden Treaty with Mexico concluded December 30, 1853.[5]

The action of Texas when as an independent nation it fixed its seaward boundary at three marine leagues, although not duplicated by similar action on the part of the thirteen original States of the United States in their colonial days, was not contrary to international law, where there was and remains lack of unanimity concerning what should constitute the sea limits of a territorial sovereign. What stands out is the existing lack of general agreement among interested States concerning an exact geographical test of limits. This was apparant at the Hague Conference of 1930.[6] It certainly could not be maintained that the three marine league test was arbitrary at the time when the State of Texas made use of it, or an extension of what the law of nations was acknowledged to permit. There is abundant evidence expressed both by commentators and statesmen that States generally enjoyed great latitude in

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[3] S. A. Riesenfeld, *op. cit.* at 259.

[4] Art. V, U. S. Treaty Vol. 1, 1109.

[5] U. S. Treaty Vol. I, 1122.

[6] See Hyde, *International Law*, 2d ed., § 141, and documents there cited.

fixing their seaward limits, and that, within those limits they felt free to regard subjacent land as their own, and, among other things to deal with it as property.[7] Internationally, as between State and State, questions did not arise concerning issues between a particular country and a constituent part thereof such as a colony or a province; for that was essentially a domestic question. What mattered was merely the nature and extent of the claim of the territorial sovereign as such in opposition to the claim of an essentially foreign country.

Now what was the precise character of the assertion which the Republic of Texas made with respect to that part of its domain which constituted the soil underlying the waters claimed to be within its territorial limits? The question obviously has nothing to do with the matter of territorial limits, except in an indirect sense. The answer is to be found in the simple examination of facts that record the doings of the State. They shed decisive light. They reveal the fact that Texas did two distinctly different things. First, Texas asserted political control or sovereignty over the area concerned; secondly, Texas definitely asserted also a property right as such over all of the territory concerned. This latter assertion was partly due to the prevalence of the Spanish law which Texas inherited and which enabled it automatically to acquire and possess itself of rights of

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[7] See "Summary of Available Opinions of Jurists and Publicists—1670-1950, On Question of Submerged Lands of Territorial Marginal Sea Being Subject to Ownership," in the Appendix of Texas' brief.

property in areas belonging to itself.[8] The documents of the time reveal distinctly how Texas affirmatively clung to and possessed itself of rights of ownership within its domain. This fact has great significance in the examination of much that follows; for it is productive of the simple question whether Texas ever did by any appropriate process through treaty or otherwise surrender to the United States property owned by the former in lands constituting the seabed within its territorial limits.

It is believed to be reasonable to declare that when Texas entered the Union, it surrendered only its governmental powers of national sovereignty—not its lands or rights of substance theretofore acquired by its own use of those powers. These rights of substance that Texas had acquired were distinct and therefore separable from the paramount governmental powers originally employed in making the acquisition. In a word, the Texan rights of substance did not pass to the United States by transfer of those governmental powers of national sovereignty. Again it should be noted that these rights of substance were not ceded to the United States by the annexation agreement. One searches in vain for a document indicating any general transfer.

Perhaps by way of repetition it needs to be emphasized that when the Supreme Court of the United States decided in the *California* case that "Cali-

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[8] The writer in his work, *International Law Chiefly as Interpreted and Applied by the United States*, Vol. 1, Title B, §§ 98-217d, has used the term "General Rights of Property and Control" to embrace the full measure of the rights which a State may in law be said to possess with respect to any particular area.

fornia is not the owner of the three-mile marginal belt along its coast" (332 U. S. at 38) it was not dealing with a situation where, as in that of Texas, a prior sovereign State had made definite claims to ownership as well as sovereignty, and where the final issue was and is whether there had been a transfer of those rights of ownership. This is really a question of treaty interpretation and unlike anything that the Supreme Court had before it in the *California* case. It is a question on which the Supreme Court has always afforded great latitude to disputing litigants for full development of the evidence as to the intention of the parties as well as to the customs and usages of nations on all related matters which throw light upon the disputed issues between them.

When Texas entered the Union it is fair to say that it only surrendered its governmental powers of national sovereignty—not its lands or rights of substance theretofore acquired by its own use of those powers.

From careful but unfinished studies in the pending case the writer is satisfied that Texas as an independent nation owned the bed and subsoil minerals underlying the Gulf of Mexico and within its three-league boundary. Accordingly, he intensely regrets that he has not further opportunity, through lack of time, to set forth at length the reasons for this conclusion. C.C.H. 3/14/50.

## SUMMARY OF AVAILABLE OPINIONS OF JURISTS AND PUBLICISTS — 1670-1950*

*On Question of Submerged Lands of Territorial Marginal Sea Being Subject to Ownership as Well as Sovereignty*

| Year | Authority | *Recognizes Both Ownership and Sovereignty* | References and Quotations | |
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| | | | *Sovereignty* | *Ownership* |
| 1670 | HALE, Matthew. Lord Chief Justice of England. *De Jure Maris* (in Hargrave's *Law Tracts*, Dublin, 1787). | *Yes* | "The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the king of England, whether it lie within the body of any county or not." (p. 10.) | "In this sea the king of England hath a double right, viz. a right of jurisdiction . . . and a right of property or ownership." (p. 10.) "And besides, the soil itself under the water is actually the king's." (p. 18.) |
| 1676 | MOLLOY, Charles. English legal writer. *De Jure Maritimo et Navali*, Bk. I. (Extract from 8th edition in Crocker, *The Extent of the Marginal Sea*, Washington, 1919; pp. 297-298.) | *Yes* | "After the writings of the illustrious Selden, certainly 'tis impossible to find any prince or republic or single person imbued with reason or sense that doubts the dominion of the British Sea to be entirely subject to that imperial diadem." (pp. 297-298.) | "And as the sea is capable of protection and government, so is the same no less than the land subject to be divided amongst men, and appropriated to cities and potentates, which long since was ordained of God as a thing most natural." (p. 298.) |
| 1688 | PUFENDORF, Samuel. German writer. *De Jure Naturae et Gentium* (17 *Classics of International Law*, Vol. II, Oxford. 1934; tr. by C. H. and W. A. Oldfather). | *Yes* | ". . . I should feel that it involves no absurdity to say that parts of the sea, in so far as they serve as a defence, and so as a part of the State, have begun to pass without any special corporal act under the dominion of that people whose shores they wash, as soon as nations learned the use of warships." (p. 564.) | "For upon this consideration the sea becomes a portion, as it were, of the land, like trenches, or even as the adjoining marshes and swamps are held to be a part of a city. . . . Just as in the occupancy of immobile objects there is no deed to touch each part with the body, but when one part has been touched, that act is understood to bring the entire thing of which it is a part under the right of ownership." (pp. 564-565.) |

*Beginning date of 1670 selected because of accord of authorities since that date on "freedom of seas" and on a distinction between "high seas" and the adjacent marginal belt included within territory of littoral State.

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| 1702 | van BYNKERSHOEK, Cornelius. Dutch jurist. *De Dominio Maris.* (Extract from Magoffin's translation of 1844 edition, in Crocker, pp. 14-15.) | *Yes* | ". . . The possession of a maritime belt ought to be regarded as extending just as far as it can be held in subjection to the mainland; for in that way, although it is not navigated perpetually, still the possession acquired by law is properly defended and maintained." (p. 14.) | "Hence we do not concede ownership of a maritime belt any farther out than it can be ruled from the land, and yet we do concede it that far; for there can be no reason for saying that the sea which is under some one man's command and control is any less his than a ditch in his territory." (p. 14.) |
| 1750 | MOSER, Johann Jacob. German publicist. *Grund-Sätze des jetzt-üblichten Europäischen Völker-rechts in Friedens-Zeiten.* Hanau. (Translated from original edition.) | *Yes* | "The existing principles of the European law of nations, however, might be the following. [1] Seas or gulfs, which are included in the states of a sovereign, are without dispute under the overlordship of that sovereign. [2] The sea on the coasts, as far as can be swept by cannon, also." (p. 345.) | |
| 1750 | SURLAND, Johann Julius. German publicist. *Grund-Sätze des Europäischen See-Rechts, Hanover.* (Translated from original edition.) | *Yes* | "The jurisdiction [*Gebiete*] over harbors, shores, coasts, and banks extends as far as the water washing thereon can be contested with cannon." (§ 483.) | "A part of the sea can be taken into possession, and accordingly dominion may be had over it." (§ 564.) |
| 1758 | de VATTEL, Emmeric. Swiss jurist and publicist. *Le droit des gens,* Bk. I. (Translation of 1797 used in Chitty's first edition, London, 1834.) The most widely cited international law authority in America during 18th and 19th centuries. | *Yes* | "These parts of the sea, thus subject to a nation, are comprehended in her territory." (§ 288.) ". . . The dominion of the state over the neighbouring sea extends as far as her safety renders it necessary and her power is able to assert it." (§ 289.) "These parts of the sea are within the jurisdiction of the nation, and a part of its territory." (§ 295.) | "The various uses of the sea near the coasts render it very susceptible of property. It furnishes fish, shells, pearls, amber, etc." (§ 287.) "When a nation takes possession of certain parts of the sea, it takes possession of the empire over them, as well as of the domain, on the same principle which we advanced in treating of the land." (§ 295.) |
| 1759 | HUBNER, Martin. Danish diplomat. *De la saisie des bâtiments neutres,* The Hague. (Translated from original edition.) | *Yes* | ". . . it is evident that these parts of the sea [which wash on the coasts] belong, as an accessory, to the master of this country." (Vol. I, p. 57.) | |

| Year | Authority | *Recognizes Both Ownership and Sovereignty* | References and Quotations | |
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| | | | *Sovereignty* | *Ownership* |
| 1760 | VALIN, René . Josué. French publicist. *Nouveau Commentaire sur l'Ordonnance de la Marine du Mois d'Août*, La Rochelle. (Translated from original edition.) | *Yes* | "Up to the distance of two leagues, then, and with that qualification [right of innocent passage in the ordinary course of navigation], the sea is in the domain of the sovereign of the neighboring coast, and that whether one can fetch bottom with the lead or not. . . . But that does not prevent the sea domain, as to jurisdiction and fishing, being capable of extension further, whether by virtue of treaties of navigation and commerce, or by the rule established above." (p. 640.) | |
| 1776-1778 | LAMPREDI, Giovanni Maria. Italian publicist. *Juris Publici Universalis sive Juris Naturae et Gentium Theoremata*, 2nd Italian ed. by Cacchi, Milan, 1828. (Translated from 1828 edition.) | *Yes* | "Therefore it cannot be doubted that these parts of the sea can be subjected to dominion and to empirium, for the sake both of utility and of security." (p. 180.) | "In the same way that the portion of the sea near to the shore may be occupied by the people to whose public dominium the territory adjacent to the sea is subject, nothing prevents a part of the sea, occupied to the extent of the advantages which it can yield, being able to fall under the ownership [*dominio*] of a private individual, if the public authority consents to it." (p. 183.) |
| 1780 | TOZE, Eobald. Dutch publicist. *La liberté de la navigation et du commerce des nations neutres pendant la guerre*, London and Amsterdam. (Translated from original edition.) | *Yes* | ". . . States contiguous to the sea . . . are masters of the shore and the sea which surrounds it as far as they can defend their ownership [*propriété*] of it from the land." (p. 23.) | |
| 1782 | GALIANI, Ferdinando, Italian statesman and writer. *Dei Doveri dei Principi Neutrali.* (Translated from 2nd edition, Bologna, 1942.) | *Yes* | "Finally, it is well established that that edge of the open sea which washes the shore of the land belongs to and is regarded as incorporated with the territory, and forms a part of it." (p. 321.) | |

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| 1787-1792 | GUNTHER, Karl Gottlob. German publicist. *Europäisches Völkerrecht in Friedenszeiten*, Altenburg. (Translated from original edition.) | *Yes* | "Within ownership and jurisdiction is (1) the entire sea on the coast of each nation, so far as it can be swept by cannon. . . ." (Vol. 2, p. 53.) | |
| 1789 | von MARTENS, Georg Friedrich. German jurist and publicist. *Précis du droit des gens moderne de l'Europe*, English translation by William Cobbett, London, 1802. Cobbett's translation of 1795, dedicated to President Washington, was subscribed to by all members of Congress. | *Yes* | "In order the better to understand the rights of nations on the seas and waters in general, it is essential to distinguish property from empire. The first implies a right to enjoy a thing exclusively, and even to dispose of it; the second, a right to demand obedience, respect, and honour, from those who make use of it." (pp. 159-160.) | "The sea surrounding the coast, as well as those parts of it which are land-locked, such as the roads, little bays, gulphs, &c. as those which are situated within cannon shot of the shore (that is, within the distance of three leagues), are so entirely the property, and subject to the dominion, of the master of the coast, that . . ." (p. 168.) |
| 1802 | NAU, B. G. German writer. *Grundsätze des Völkerseerechts*, Hamburg. (Translated from original edition.) | *Yes* | ". . . If, however, the coasts form a part of the land which belongs to the possessions of a people, the necessary security of the state demands the removal of the common use of these shores, and along with the dominion of the shores for their security it demands that the state assert ownership also over an additional part of the sea territory." (p. 101.) | |
| 1803 | BOUCHER, Pierre B. French jurisconsult. *Institution du droit maritime*, Paris. (Translated from original edition.) | *Yes* | "I call territorial sea that part of the sea which borders on the coasts of a State." (p. 46.) | ". . . The sea which washes the coast of a State is property, or a continuation of its territorial property." (p. 46.) |
| 1803 | RAYNEVAL, Joseph Mathias Gerard de. French publicist. *Institutions du droit de la nature et des gens*, Paris. (Translated from original edition.) | *Yes* | "The sea which washes the coasts of a State is considered to be a part of it; . . . the sea must serve her as a rampart." (p. 161.) | "We might add that the bottom of the sea, along the coasts, can be considered as having been part of the continent, and that it is therefore considered as still forming part of it. But the extent of this ownership is not determined by a uniform rule: some carry it out to thirty leagues, others only to three; others fix it at the range of cannon placed on the seashore. Along the southern coast of France, the distance was ten leagues as to the Barbary States." (p. 161.) |

| Year | Authority | *Recognizes Both Ownership and Sovereignty* | References and Quotations | |
|---|---|---|---|---|
| | | | *Sovereignty* | *Ownership* |
| 1805 | AZUNI, M. D. A. Italian jurisconsult. *Droit maritime de l'Europe*, Vol. I; English translation by William Johnson, New York, 1806. | *Yes* | "In the first ages of the world, the sea adjacent to the coast, belonged to the first occupier of the main land, as well on account of its utility for fishing and transportation, as because it was considered as an appendage, or rather, an accession to it." (p. 182.) "The right of sovereignty along the seashore flows from the territorial domain." (p. 186.) | "It follows from this fundamental principle, that the empire of the sea, according to the system established in the preceding chapter, is not to be regarded as a vain jurisdictional right . . . but has the real effects of every other kind of property. It differs in nothing from that of the land." (p. 224.) |
| 1806 | JOUFFROY, Henri. Prussian diplomat. *Le droit des gens maritime universel*, Berlin. (Translated from original edition.) | *Yes* | "The imperium [*empire*] over territorial seas, in the extent commonly given to it, is not a vain prerogative, an honorific right, but is of such a nature that it has the results of any other territorial property." (p. 27.) | "Ownership of these [territorial seas] belongs incontestably to the nation, since it can occupy them and defend them either by vessels stationed off the coast or batteries mounted on it; and since it may cause works to be carried out in these seas to make the approaches and use safe and convenient, by putting up signal lights or marking shallow depths and surface rocks by buoys." (p. 23.) |
| 1811 | SCHULTES, Henry. English publicist. *Essay on Aquatic Rights*, London. | *Yes* | "By the common law, the king hath the sovereign dominion over the sea adjoining the coasts, and over the navigable rivers; and hath also the right of property in the soil thereof, and is consequently entitled to all *maritima incrementa*." (p. 109.) | |
| 1817 | SCHMALTZ, Theodore Anton Heinrich. German publicist. *Das Europäische Völker-Recht*, Berlin. (Translated from original edition.) | *Yes* | "But there are parts of the sea over which the dominion of a state is recognized by all nations, even when they are not so surrounded by land that this supremacy might seem to be a natural consequence." (p. 140.) | "Moreover, the sea along the coasts has always been regarded as the property of that country. . . . It is said that the sea must belong to the land as far as it can be defended from land, and that this extends as far as a shot from a cannon on the shore may reach; but this has since been fixed rather arbitrarily at three leagues." (p. 141.) |

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| 1818 | SCHMELZING, Julius. German publicist. *Systematischer Grundriss des prakitschen Europäischen Völker-Rechtes*, Rudolfstadt. (Translated from original edition.) | *Yes* | "It has become a general rule of the courts [*Grundsatz der Höfe*] that the part of the sea bordering on the shore is considered to belong to the land, as far, that is, as it can be contested from the land." (Vol. 2, p. 12.) | |
| 1819 | KLUBER, Johann Ludwig. German publicist. *Droit des gens moderne de l'Europe*, Stuttgart. (Translated from original edition ) | *Yes* | "To the *maritime territory* of a state belong the maritime districts or areas susceptible of exclusive possession, over which the state has acquired (by occupation or convention) and maintained sovereignty. In this category are (1) the parts of the ocean which border on the mainland territory of the state. . . ." (p. 199.) | |
| 1821 | HOLROYD, J., in *Blundell v. Catterall*, 5 B. & Ald. 268, 106 Eng. Rep. 1190 (King's Bench). | *Yes* | "By the common law . . . the soil betwixt the ordinary flux and reflux of the tide, as well as the [territorial] sea itself, belongs to the King." (p. 1201.) "An appropriation by any of the King's subjects, without his grant or license, . . . would be . . . an intrusion upon the King's soil." (p. 1201.) | |
| 1826 | ANGELL, Joseph Kinnicut. American writer. *A Treatise on the Right of Property in Tide Waters, and in the Soil and Shores Thereof*, Boston. | *Yes* | "To the king, therefore, is not only assigned the sovereign dominion over the sea adjoining the coasts, and over the arms of the sea; but in him is also vested the *right of property* in the *soil thereof*." (p. 18.) | |
| 1829 | LORD WYNFORD, in *Benest v. Pipon*, 1 Knapp 60, 12 Eng. Rep. 243 (Privy Council). | *Yes* | "The laws of England and Jersey [are] precisely the same with regard to land that is below ordinary tides, dealing with such land as a part of the bottom of the sea, and vesting the original right to it in the King." (p. 247.) "The sea is the property of the King, and so is the land beneath it, except such part of that land as is capable of being usefully occupied without prejudice to navigation, and of which a subject has either had a grant from the King, or has exclusively used for so long a time as to confer on him a title by prescription." (p. 246.) | |
| 1830 | HALL, Roebrt Gream. English writer. *An Essay on the Rights of the Crown and the Privileges of the Subject in the Sea-shores of the Realm*, London. | *Yes* | "The title of the King of England to the land or soil *aqua maris cooperta*, is similar to his ancient title to all the *terra firma* in his dominions, as the first and original proprietor and lord paramount." (p. 4.) | "This dominion and ownership over the British seas, vested by our law in the King, is not confined to the mere usufruct of the water, and the maritime jurisdiction, but it includes the very *fundum* or soil at the bottom of the sea." (p. 2.) |

| Year | Authority | *Recognizes Both Ownership and Sovereignty* | References and Quotations | |
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| | | | *Sovereignty* | *Ownership* |
| 1830 | WOOLRYCH, Humphrey William. English writer. *A Treatise on the Law of Waters and of Sewers, Including the Law Relating to Rights in the Sea*, London. | *Yes* | "It is agreed, that as the king has the sovereign dominion over the sea adjoining to the coasts, and over the navigable rivers, he has also a right of property in the soil. And thus it is, that he becomes entitled to maritime accessions, or, as they are called, *incrementa*, save and except fish other than royal fish." (p. 19.) | |
| 1832 | BELLO, Andrés. Venezuelan diplomat and professor of international law. *Principios de Derecho de Jentes*, Santiago de Chile (Translated from original edition.) | *Yes* | "Regarding the sea, there is a generally admitted rule: each nation has the right to consider as pertaining to its territory and subject to its jurisdiction the sea which washes its coasts out to a certain distance." (p. 31.) | |
| 1833 | SAALFELD, Jakob Christoph Friedrich. German writer. *Handbuch des positiven Völkerrechts*, Tübingen. (Translated from original edition.) | *Yes* | "The right of every nation is generally recognized to appropriate to itself so much of the open sea which does not go into the land, as it can control." (p. 93.) | ". . . The shore and the part of the sea which washes it are the property [*eigenthum*] of the state." (p. 93.) |
| 1836 | WHEATON, Henry. American lawyer, diplomat and publicist. *Elements of International Law*, Philadelphia. | *Yes* | "The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon-shot will reach from the shore, along all the coasts of the state." (p. 142.) | "Within these limits, its rights of property and territorial jurisdiction are absolute and exclude those of every other nation." (pp. 142-3.) |
| 1840 | LUCCHESI-PALLI, Ferdinando. Italian publicist. *Principii di diretto pubblico maritimo;* French translation, *Principes du droit public maritime*, Paris, 1842. (Translated from French edition.) | *Yes* | "The portion of the sea which washes on the coasts off which fishery of pearls, amber, coral, etc., takes place, is susceptible of appropriation. In fact, these objects which are sought there are not inexhaustible, and it is just that the nearby inhabitants of these coasts should appropriate them and acquire absolute possession of them, as they do with the land they live on." (p. 4.) | |

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| 1844 | HEFFTER, A. W. German jurist and writer. *Das Europäische Völkerrecht der Gegenwart*, Berlin. (Translated from original edition.) | *Yes* | "It is admitted by most that the national property . . . extends . . . (c) over the whole coastal sea, as far as can be kept in exclusive possession, either from the coast or by the ever present naval power and defense works (*quousque mari e terro imperari potest*); concerning this, it seems there is a general agreement among the nations in principle, even though the extent of the maritime frontier is not in complete accord by all." (p. 131.) | |
| 1844 | MASSE, Gabriel. French lawyer. *Le droit commercial dans ses rapports avec le droit des gens*, Paris. (Translated from original edition.) | *Yes* | "Each nation has therefore a right of police and jurisdiction over the part of the sea which borders on its coasts and forms in some sort a part of its territory." (Vol. 1, p. 111.) | "The sea which borders on the coasts can be considered, up to a certain distance, as their natural rampart, consequently as accessory to them, and in this respect it belongs to the sovereign of the land it limits." (Vol. 1, p. 111.) |
| 1845 | SALA, Juan. Mexican publicist. *Sala Mexicano, o sea La Ilustración al Derecho Real de España*. Mexico. (Translated from original edition.) | *Yes* | "The various uses made of the sea near the coasts make it susceptible of ownership as to that portion adjacent to the land . . . This use of the sea coupled with the faculty they [nations] have to prohibit other nations from so doing, has converted the sea as to this portion thereof into property no different than the lands occupied by them." (Vol. 2, p. 11.) | |
| 1846 | LORD COCKBURN, in *Officers of State v. Smith*, 8 Sess. Cas. 711 (Court of Session of Scotland), aff'd, *Smith v. Earl of Stair*, 6 Bell's App. Cas. 487 (House of Lords). | *Yes* | "I know of nothing which I think might be predicated with greater safety or that less requires formal proof, than that the bed of the British seas belongs in property to the British Crown." (p. 723.) | |
| 1848 | HAUTEFEUILLE, Laurent Basile. French jurist. *Des droits et des devoirs des nations neutres en temps de guerre maritime*, Paris. (Translated from original edition.) | *Yes* | "Territorial seas . . . are under the sovereignty of the nation who is mistress of the coast washed by them; they are under her dominion in the same manner and by the same title as the land." (p. 231.) | ". . . According to primary law, the territorial sea can be brought under the sovereign domain, and . . . it is the property of the riparian nation." (p. 231.) "There is continuous, complete, and absolute possession, as there might be of a river, a lake, or a piece of land territory." (p. 232.) |

| Year | Authority | *Recognizes Both Ownership and Sovereignty* | References and Quotations | |
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| | | | *Sovereignty* | *Ownership* |
| 1849 | RIQUELME, Antonio. Spanish diplomat and publicist. *Elementos de Derecho Publico Internacional*, Madrid. (Translated from original edition.) | *Yes* | "The rule recognized by the law of nations for determining the legal status of the littoral seas is based on the idea that all is lawful for the lord of the coasts which his own preservation demands and which can not prevent innocent use by others." (Vol. 1, p. 209.) | ". . . The right of property may be exercised over ports and littoral seas. . . . By the term 'territory' belonging to a state is understood not only its land territory, but also its rivers and interior seas, its lakes, ports and littoral seas." (Vol. 1, p. 23.) |
| 1853 | ORTOLAN, Jean Félicité Théodore. French naval officer and writer. *Règles internationales de diplomatic de la mer*, 2nd ed., Vol. I. (Excerpts from translation in Crocker, pp. 347-352.) | *No* | ". . . the general custom of nations in accordance with public treaties, permits imaginary lines to be traced along the coast at a suitable distance following its sinuosities, which may be considered as the artificial maritime boundary. Every ship which finds itself inside of this line is said to be *in the waters* of the State whose right of sovereignty and jurisdiction it limits." (p. 349.) | "The obstacle of universal reason always exists; thus the right over the territorial sea is not one of property." (p. 350.) (Author writes only of waters, not of bed or subsoil.) |
| 1853 | POLSON, Archer. English writer. *Principles of the Law of Nations*, London. | *Yes* | "So much of the sea as is included within the territories of a State . . . is considered as belonging to that State." (p. 34.) | |
| 1854 | BARON ALDERSON, in *Attorney-General v. Chambers*, 4 De G. M. & G. 206, 43 Eng. Rep. 486 (Chancery). | *Yes* | "The Crown is clearly in such a case, according to all the authorities, entitled to the *'littus maris'* as well as to the soil of the sea itself adjoining the costs [*sic*] of England." (p. 489.) The case involved title to coal veins extending under the sea. | |

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| 1854 | PHILLIMORE, Robert J. English jurist. *Commentaries upon International Law*, Vol. 1, London. | *Yes* | "Though the open sea be thus incapable of being subject to the rights of property, or jurisdiction, yet reason, practice, and authority have firmly settled that a different rule is applicable to *certain portions* of the sea. And first with respect to that portion of the sea which washes the coast of an independent State." (p. 210.) | "Besides the rights of property and jurisdiction within the limit of cannon-shot from the shore, there are certain portions of the sea which, though they exceed this verge, may, under special circumstances, be prescribed for. . . ." (p. 212.) |
| 1856 | CUSSY, Ferdinand Baron de. French publicist. *Phases et causes célèbres du droit maritime des nations*. Vol. I. (Excerpts from translation in Crocker, pp. 48-53.) | *Yes* | "But the protection of the territory of a nation and its shore fishing, which is the chief resource of the inhabitants of the coast region shows the necessity of recognizing a *maritime territory*, or, better still, a territorial sea, for all coast States —that is, some definite distance from the coast *considered as a continuation of the territory*, and over which the special sovereignty of each maritime nation might extend." (p. 48.) | "Although the extent of the property or sovereignty over the territorial sea still appears to present some uncertainty, it does not exist to the extent indicated by the observations of Rayneval." (p. 52.) (The uncertainty he mentions refers to the *extent* of the territorial sea.) |
| 1859 | LORD CHELMSFORD, in *Gammell v. Commissioners of Woods and Forests*, 3 Macqueen's Appeal Cases 419 (House of Lords). | *Yes* | "It only remains to be considered whether this right [salmon-fishing around the seacoast] belongs to the crown merely as an attribute of its sovereignty, and as a trustee for the public, or whether it is to be regarded as a *patrimonium*, and therefore as a part of its hereditary revenues. I do not think that your lordships will entertain much doubt upon this point. . . . All the passages from the writers already quoted as to the effects of grants of salmon fishing, or of grants *cum piscationibus*, support the right of property in the Crown." (pp. 463-64.) | |
| 1860 | GARDNER, Daniel. American lawyer and writer. *Institutes of International Law*, New York. | *Yes* | "A nation's exclusive jurisdiction, by virtue of its sovereignty, extends over its maritime curtilage, if it be a maritime State." (p. 21.) | "Every nation and State, by virtue of sovereignty, is deemed the original owner of the soil of its territory, with its curtilage, if any, of the soil under great lakes, naturally and nationally navigable, rivers, straits, bays, and under such curtilage." (p. 402.) |

| Year | Authority | *Recognizes Both Ownership and Sovereignty* | References and Quotations | |
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| | | | *Sovereignty* | *Ownership* |
| 1862 | CAUCHY, Eugène. French publicist. *Le droit maritime international.* (Excerpts from translation in Crocker, pp. 41-44.) | *Yes* | "It can not be doubted by anybody that the portions of the sea adjoining the coast in a certain measure participate of the nature of the coasts themselves and may, in certain respects, fall within the useful domain of such State or people or in other respects depend upon its police." (p. 42.) | "If it is true that the mass of waters of which the open sea is composed, by its nature escapes occupation or domination, we must recognize that these same waters divided into stretches of small extent become susceptible of public, or even private property." (p. 41.) |
| 1865 | LORD WESTBURY, in *Gann v. The Free Fishers of Whitstable*, 11 House of Lords Cases 192. | *Yes* | The Court of Common Pleas, affirmed by the Exchequer Chamber, held that the soil of the marginal sea was vested in the Crown and could (before Magna Carta) be granted as a several fishery. The House of Lords agreed, but reversed the judgment on the ground that the Crown's ownership was subject to the public right of navigation, and that therefore no toll for anchorage could be charged. | |
| 1866 | OPPENHEIM, Heinrich Bernard. German publicist. *System des Völkerrechts*, 2nd ed., Stuttgart and Leipzig. (Excerpts from translation in Crocker, pp. 336-339.) | | "The property of the State extends as far as the direct material influence, '*corporalis detentio*'; or according to the old saying: '*Terrae dominium finitur ubi finitur armorum vis.*'" (p. 336.) | |
| 1866-1867 | POMEROY, John Norton. American jurist and writer. *Lectures on International Law in Time of Peace* (1866-67), edited by Theodore S. Woolsey, Boston and New York, 1886. | *Yes* | "It has always been considered that the territorial rights of a nation whose land is washed by the ocean are not limited by high or low-water mark; but extend to *some* distance over the neighboring waters." (p. 176.) | "There are, as we have seen, exceptional parts of the sea where . . . possession, and, therefore, proprietorship and dominion, can be and are maintained. Such are ports, roads, straits, bays, gulfs, enclosed seas, and even the main ocean itself for a little distance from the shores." (p. 190.) |

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| 1868 | BON, Antonio del. Italian publicist. *Instituzioni del Diritto Publico Internazionale*, Padua (Translated from original edition.) | *Yes* | Approves Sarp's statement that "any state has dominion [*e padrone*] over such part of the sea as it needs to have, without injury to the other states." (p. 83.) "The right of the subjects of a state to fish originates in property rights that the state has over its territorial sea." (p. 79.) | |
| 1868 | LORD NEAVES, in *Duchess of Sutherland v. Watson*, 6 Sess. Cas. 199 (Court of Session of Scotland). | *Yes* | ". . . The *solum* or *fundus* of the deep sea—that is, not only the part between high-water and low-water mark, but the sea within such a line as may be reasonably drawn in connection with the shores—belongs in property to the Crown, and does so as a patrimonial right." (p. 213.) | |
| 1875 | CARNAZZA-AMARI, Giuseppe. Italian publicist. *Trattato sul diritto internazionale publico di pace*, 2nd ed.; French translation, *Traité de droit international public en tempts de paix*, by Montanari-Revest, Paris, 1880-1882. (Excerpts from translation in Crocker, pp. 34-40.) | *Yes* | "The possession of the territorial sea is possible because by erecting fortifications upon the shore the State can prevent access and guarantee the exercise of sovereignty. Consequently the adjacent seas, ports, gulfs, straits, bays, etc., are subject to the sovereignty of States and considered a part of their territory." (p. 36.) | "Thus, we may admit the property of the State over the coast of the sea, over its beaches, and even over the fruits of the submarine soil." (but not over the water). (p. 38.) |
| 1876 | CASANOVA, Ludovico. Italian publicist. *Del Diritto Internazionale Lezisni*, 3rd ed. by Emilio Brusa, Florence. (Translated from 3rd edition.) | *Yes* | "All the treaties, without exception, when referring to commercial interests, recognize, on the part of the nations, a right of sovereignty over its territorial sea as if it were a part of its land territory." (p. 127.) | "The reasons for the absence of rights of property or imperium over the sea are not present, absolutely in all its areas. There are certain parts near the land . . . where such reasons disappear." (p. 116.) |

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| | | | *Sovereignty* | *Ownership* |
| 1876 | LORD COCKBURN and LORD COLERIDGE, in *The Queen v. Keyn*, [1876] L. R., 2 Ex. Div. 63 (Court of Crown Cases Reserved). | | This case does not cover ownership, and the majority view expressed by Lord Cockburn cast doubt upon both sovereignty and ownership of England over the marginal sea. The minority views expressed by Lord Coleridge and others upheld the theory of both sovereignty and ownership. It is the only common law case which questions either right, and it has been sharply criticized by many publicists and subsequent English cases. Parliament in 1878 passed a law asserting both soveriegnty and ownership. John Bassett Moore said that Parliament "considered it imperative to adopt legislation nullifying the decision's effect for the future, besides declaring it wrong as to the past." (Moore's Collected Pape s, Vol. 7, p. 294.) | |
| 1876 | CREASY, Edward S. English writer. *First Platform of International Law*, London. | *No* | "But the right of the State to exclusive jurisdiction over the adjacent sea within the range of cannon-shot applies only to purposes of defence, to the protection of the State's fisheries, revenues, and to secure its maintenance of neutrality." (p. 234.) (Refers only to waters, not to bed and subsoil.) | |
| 1876 | FIELD, David Dudley. American jurist. *Outlines of an International Code*, 2nd ed., New York and London. | *Yes* | "The territory of a nation is the land and water which it possesses, or has a present right to possess, as defined and limited by actual and peaceful occupation, by special compact, or by the provisions of this Code. Territory is here used in the sense of sovereignty and jurisdiction, and not in the sense of property." (p. 14.) | "The limits of national territory, bounded by the sea, extend to the distance of three marine leagues outward from the line of low-water mark." (p. 15.) "A nation is presumed to be the owner of all public, and all unappropriated, property within its territorial limits." (p. 21.) |
| 1878 | BLUNTSCHLI, J. D. German jurist. *Das Moderne Völkerrecht der Civilisirten Staten*. 3rd ed., Nördlingen. (Translation from 3rd edition.) | *Yes* | "The following are subject to a restricted territorial sovereignty: a. The coastal margin that washes upon the land: . . . The close relation of such parts of the sea to the land and to the state justifies a relative extension of territorial sovereignty." (p. 185.) | "The same are regarded as an appurtenance of the land, the power and protection of which extend over it." (p. 185.) |

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| 1878 | WOOLSEY, Theodore Dwight. American teacher of internation law. *Introduction to the Study of International Law*, 5th ed. (Page references are to 6th ed. by T. S. Woolsey, New York, 1892.) | | "The right to some kind and degree of jurisdiction over a belt of coast-sea is now admitted by writers on international law of all Christian nations, and appears in a number of treaties." (§ 57, p. 68.) | "An important question is, How much or what degree of right a state has over that part of the high sea which washes its shores. The answer must be that the right is a *limited* one." (§ 57, p. 69.) (He discusses superior rights of navigation but recognizes right to prohibit others from taking shell-fish, etc. § 59, p. 74.) |
| 1879-1884 | FIORE, Pasquale. Italian jurist. *Trattato di diritto internazionale publico*, 2nd ed.; French translation, *Nouveau droit international public*, by Charles Antoine, Paris, 1885. (Translated from French edition.) | *Yes* | "The sea, to a certain point from the coast forms a part of the territory of the State and is possessed by the Sovereignty which has the exclusive possession of it as against all other States. It is for this reason that it is called territorial sea; because the State has the juridical possession of it, which, as we have said above, it does not have of the high sea." (§ 801.) | "It remains now only to concern ourselves with the useful domain which pertains to the State, which has the right to profit from the products of its territorial waters and to prevent all other States from enjoying them." (§ 805.) |
| 1882 | MARTENS, F. de. Russian diplomat and publicist. *Völkerrecht, Das International Recht der Civilisirten Nationen*, Vol. I, German edition by Carl Bergbohm, Berlin, 1883. (Translated fron Bergbohm's edition.) | *Yes* | "By territorial waters one understands that part of the sea which immediately washes the shores of the coastal state. This part of the sea is recognized as the property of the state concerned, considered a continuation of its coastal land and stands under its sovereignty." (p. 378.) | |

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| | | | *Sovereignty* | *Ownership* |
| 1882 | PERELS, Ferdinand Paul. German publicist. *Das internationale öffenliche Seerecht der Gegenwart; French translation, Manuel de droit maritime international*, by F. Arendt, Paris, 1884. (Excerpts from Arendt's translation in Crocker, pp. 352-59.) | *No* | "The territorial sea, or maritime territory, is that part of the sea which extends from the coast a certain distance out. It is regarded as a national domain of the State whose coasts it washes. . . ." (p. 352.) | "No right of property, *dominium*, such as is ascribed to the State over the shore itself, is claimed over the territorial sea thus reserved." (Apparently refers to waters of sea without distinguishing them from bed and subsoil.) (p. 353.) |
| 1883 | NEGRIN, Ignacio de. Spanish publicist. *Tratado de Derecho Internacional Marítimo*, 2nd ed., Madrid. (Translated from 2nd edition.) | *Yes* | "Those above-mentioned waters [the littoral sea] . . . must be considered the maritime border of the state." (p. 63.) | "The littoral sea may be permanently owned and dominated." (p. 64.) |
| 1884 | FERGUSON, Jan Helenus. Dutch diplomat. *Manual of International Law*, Vol. 1, London. | | "Under the Jurisdiction of a State come also, besides the territorial properties above mentioned, the mouths and estuaries of rivers, the bays and a certain portion of the sea, called the *Territorial Waters*." (p. 97.) | "Within the limits of their jurisdiction each State has the exclusive right of coast-fishery," etc. (Does not treat of bed or subsoil.) (p. 400.) |
| 1884 | TWISS, Sir Travers. English jurist and publicist. *The Law of Nations Considered as Independent Political Communities*, 2nd ed., Oxford. | *Yes* | "In the case of portions of the Sea, a Nation may have a peculiar possession of them, so as to exclude the universal or common use of them by other Nations." (p. 295.) | "Lord Stowell held that portions of the Sea might be prescribed for; and Mr. Justice Story deemed it possible that a Nation might have an exclusive use founded on the acquiescence or tacit consent of other Nations . . . the title is a matter to be established on the part of those claiming it, in the same manner as all other legal demands are to be substantiated by clear and competent evidence; in other words, by proof of ancient and constant usage." (p. 295-296.) |

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| 1885 | PRADIER-FODERE, P. French publicist. *Traité de droit international public européen et américain*, Paris. (Translated from original edition.) | *Yes* | "The sovereignty and jurisdiction of the State does not stop, then, on the shore, but extends beyond, onto a part of the sea which washes it." (§ 619.) | "The right of the littoral State in the territorial sea is, then, a right of property." (§ 627.) |
| 1886 | TESTA, Carlos. Portuguese naval officer. *Le droit public international maritime*, translated from the Portuguese into French by Ad. Boutiron, Paris, 1886. (Translated from the French edition.) | | "It results from this combination of circumstances that if a State does not have the right of property in the territorial waters, nevertheless it maintains there a right of domain or of *jurisdiction* which cannot be legitimately contested." (p. 72.) | He says waters cannot be owned to exclusion of innocent passage and common use, but apparently leaves bed and subsoil within general rule applicable to territory. (p. 72.) |
| 1887 | LEVI, Leone. English lawyer and teacher. *International Law with Materials for a Code of International Law*, London. | *Yes* | "Territorial sovereignty extends over both land and water within the territory, as well as over the natural increment of the land, as far as it can be defended from land." (p. 90.) | |
| 1887 | NUGER, A. French lawyer. *Des droits de l'état sur la mer territoriale* (thesis for the doctorate, Faculté de droit de Paris), Paris. (Translated from original edition.) | | "Neither shall we adopt the system according to the State an *imperium*, absolute sovereignty in this sea, because according to our view the littoral State has, at the same time, both less and more than a true right of sovereignty." (p. 119.) | "Thus, it is more than a right of sovereignty. It is, indeed, difficult to explain, if one recognizes in the State only the *imperium* over the neighboring sea, the existence and the legitimacy of certain rights which, nevertheless, are unquestionably attributed to it, for example, the exclusive right of fishery for the enjoyment of its nationals." (p. 160.) |

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| | | | *Sovereignty* | *Ownership* |
| 1889 | IMBART de LATOUR, Joseph. French advocate. *La mer territoriale*, Paris. (Translated from original edition.) | | "In the absence of special agreements, each State is the owner of its shores, and exercises its right of sovereignty over the territorial waters which surround it." (p. 19.) | "This portion of the sea is called territorial, and is considered fictitiously as a continuation of the continental territory." (p. 8.) Expresses opposition to this theory because of danger to common use and navigation. Otherwise recognizes exclusive rights to wealth of adjacent sea, such as corals off coast of Algeria. (p. 175.) |
| 1891 | LORD KYLLACHY, in *The Lord Advocate v. The Clyde Trustees*, 19 Rettie 174, 29 Scottish Law Rep. 153 (Court of Session). | *Yes* | "Is the Crown's right in that strip of sea proprietary, like the Crown's right in the foreshore and in the land, or is it only a protectorate for certain purposes, and particularly navigation and fishing? I am of the opinion that the former is the correct view." (Rettie, p. 177; Sc.L.R., p. 156.) | |
| 1894 | PIEDELIEVRE, Robert. French publicist. *Précis de droit international public, ou droit des gens*, Paris. (Translated from original edition.) | *Yes* | "The State exercises its sovereignty over the full extent of a determined *territory*, within the limits of which it acts in all independence. . . . The surface of the national territory is composed of land and of water: from which we have the distinction between *terrestrial* territory and *fluvial* or *maritime* territory." (Vol. 1, p. 323.) | "This territory is the object of its right of property." (p. 323.) "One calls *territorial sea* the extent of the sea in which the State can, from the coast, make its power respected. This part of the sea is considered fictionally as a continuation of the continental territory. . . . This fiction is justified by several reasons." (Vol. 1, p. 335.) |
| 1895 | WALKER, Thomas A. English professor of international law. *A Manual of Public International Law*, Cambridge. | *Yes* | "By a consensus of writers, without one single authority to the contrary, some portion of the coast-waters of a country is considered for some purposes to belong to the country the coasts of which they wash. . . . This is established as solidly, as, by the very nature of the case, any proposition of international law can be." (p. 37.) | "Any definite area of the solid surface of the earth may by the adoption of a certain procedure become the sole property of a single people. . . . The methods of international territorial acquisition extend alike to land and water." (p. 26.) |

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| 1896 | CALVO, Carlos. Argentinian publicist and diplomat. *Le droit international théorique et pratique*, 5th ed., Paris. (Translated from 5th edition.) | *No* | Does not recognize either complete sovereignty or ownership. "The States do not have in the territorial sea a right of property, but only a right of supervision (*surveillance*) and of jurisdiction in the interest of their own defense or the protection of their fiscal interests." (Vol. 1, p. 479.) (Apparently deals only with waters, not with bed or subsoil.) |
| 1896 | HEILBORN, Paul. German publicist. *Das System des Völkerrechts*, Berlin. (Translated from original edition.) | *Yes* | "The assumption of a real right [*dinglichen Rechts*—at p. 55 he says that this is the property theory] to the coastal waters and accordingly also to the harbors and bays that lie to the landward of them seems therefore necessary." (p. 43.) "Hall points appropriately to the fact that the exclusive right of the littoral state to the acquisition of the products of the sea in the coastal waters must be derived only from a right to the coastal waters, not from an *imperium*." (p. 41.) |
| 1897 | SCHUCKING, Walther Max Adrian. German publicist. *Das Küstenmeer in Internationalen Rechte*, Göttingen. | | Recognizes sovereignty but does not deal with ownership of bed or subsoil. |
| 1898 | LAPRADELLE, A. Goeuffre de. French publicist. "Le droit de l'état sur la mer territoriale public," 5 *Revue de droit internationale public*, pp. 264-284, 309-347. | *No* | Says the State has "only a bundle of servitudes" but admits his system "has support neither in tradition nor in doctrine." "In denying that the territorial sea is a distinct sea, and in recognizing not sovereignty but simply coastal servitudes for the littoral State, we have unfortunately no authorities to invoke." (p. 347, translated at p. 236 by Crocker.) |
| 1898 | STOCKTON, C. H. *A Manual of International Law Based upon Lectures Delivered at the Naval War College by Freeman Snow*, 2nd ed., Washington. (Published by direction of the Navy Department.) | *Yes* | "As to marginal seas, a State can claim the narrow belt of water now universally conceded as territorial property, as a matter of necessity for the better security of its people on land and also for the enjoyment of its fisheries." (p. 15.) |
| 1899 | LORD WATSON, in *The Lord Advocate v. Wemyss*, [1900] A. C. 48 (House of Lords). | *Yes* | Said that within the territorial sea "the *solum* underlying the waters of the ocean, . . . and also the minerals beneath it, are vested in the Crown." (p. 66.) |

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| | | | *Sovereignty* | *Ownership* |
| 1900 | DAVIS, George B. American publicist. *The Elements of International Law*, New York and London. | *Yes* | "On this belt of coast sea, called the marine league, a state is acknowledged to have complete jurisdiction as against other states; whether its courts can assume jurisdiction over it or not will depend upon its municipal laws." (p. 55.) | "In accordance with the municipal law of most states . . . private ownership ceases at high-water mark; the ownership of . . . lands under the sea, so far as such lands are susceptible of being made the subject of proprietorship, being vested in the state which they adjoin." (Footnote, p. 57.) |
| 1900 | GOULD, John M. American publicist. *A Treatise on the Law of Nations*, 3rd ed. | *Yes* | "Maritime countries have claimed from the earliest times more or less extended dominion over these waters, and spbjected them to the laws and regulations of the state; . . ." (pp. 3-4.) | "The dominion over the territorial seas, as they are called, may, therefore, include rights of jurisdiction, or of property, or both." (pp. 3-4.) |
| 1901 | GAREIS, Karl. German law teacher. *Institutionen des Völkerrechts*, 2nd ed., Giessen. (Translated from the 2nd edition.) | *Yes* | "To this territory of the state over which it exercises sovereignty belong the following: . . . the strip of sea which, in drawing the boundary of a state's sovereignty seaward, must fall to the sovereignty of a coastal state." (p. 72.) | "Within the territory of the state (inclusive of the seas belonging to the country) the state can recognize as its interests anything that it wishes, and can promote these interests with any means which it may deem appropriate." (p. 85.) |
| 1901 | TAYLOR, Hannis. American jurist. *A Treatise on International Public Law*, Chicago. | *Yes* | "The whole space over which a nation extends its government becomes the seat of its jurisdiction, and is called its territory. Vattel, *Droit des Gens*." (p. 206.) "As incidents to such territorial possessions must be added a state's jurisdiction over its marginal waters when its territory abuts upon the sea." (p. 263.) | ". . . As to the right itself there can be neither cavil nor question, . . . (3) because without it no state can retain and protect the natural products of the sea for the exclusive benefit of its own citizens." (p. 293.) |

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| 1903 | OLIVART, Marques de. Spanish publicist. *Tratado de Derecho Internacional Público*, 4th ed., Madrid. (Translated from 4th edition.) | *Yes* | ". . . The jurisdiction of the state over its territorial sea is exclusive as it is over its land territory." (Vol. I, p. 204.) | ". . . Let us study the things over which an absolute right of possession exists although conditioned by international law. . . . The part of the sea near the coasts must be adjudicated to the state which owns those coasts." (Vol. I, p. 203.) |
| 1904 | HALL, William E. English authority on international law. *A Treatise on International Law*, 5th ed. by J. B. Atlay (retaining text of author), Oxford. | *Yes* | "The territorial property of a state consists in the territory occupied by the state community and subjected to its sovereignt , and it comprises the whole area . . . and, when such area abuts upon the sea, together with a certain margin of water." (p. 100.) | "In claiming its marginal seas as property a state is able to satisfy the condition of valid appropriation. . . . Accordingly, on the assumption that any part of the sea is susceptible of appropriation, no serious question can arise as to the existence of property in marginal waters." (pp. 152-53.) |
| 1904 | WESTLAKE, John. English publicist. *International Law*, Cambridge. | *Yes* | "Occupation [by the littoral State] is presumed to a geographical extent presently to be considered. Within that extent the water and its bed are territorial, and the wealth of both is the property of the territorial sovereign." (p. 184.) | |
| 1906 | MOORE, John Bassett. American authority on international law. *A Digest of International Law*, Washington. | *Yes* | Quotes from Hall in stating the general principle: "The territorial property of a state consists in the territory occupied by the state community and subjected to its sovereignty, and it comprises the whole area, whether of land or water, . . . together with a certain margin of water." (Vol. I, p. 615.) | Quotes from Rivier in stating the general principle: "The principle that the littoral sea forms part of the territory is justified by the exigencies of the conservation and safety of the state, from the military, sanitary, and fiscal point of view, as well as from the point of view of industrial interests, especially that of the fisheries." (Vol. I, p. 699.) |
| 1908 | PARKER, J., in *Lord Fitzhardinge v. Purcell*, 2 Ch. 139 (Sup. Ct. of Judicature, Chan. Div.). | *Yes* | "Clearly the bed of the sea, at any rate for some distance below low-water mark, and the beds of tidal navigable rivers, are prima facie vested in the Crown, and there seems no good reason why the ownership thereof by the Crown should not also, subject to the rights of the public, be a beneficial ownership. The bed of the sea, so far as it is vested in the Crown, and a fortiori the beds of tidal navigable rivers, can be granted by the Crown to the subject." (p. 166.) | |

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| | | | *Sovereignty* | *Ownership* |
| 1908 | von ULLMANN, E. German publicist. *Völkerrecht*, Tübingen. (Translated from original edition.) | *Yes* | "The general recognition of the exclusive rights of the littoral state in the line just mentioned is in fact conceivable and justifiable only by simultaneous recognition of the exclusive sovereignty of the littoral state." (p. 290.) | "To the water territory of a state belongs also the coastal sea. . . . It is a question of assuring the interests of the shore inhabitants in the exclusive and undisturbed exploitation of the products of the sea." (p. 290.) |
| 1911 | FULTON, Thomas Wemyss, Scottish writer. *The Sovereignty of the Sea*, Edinburgh and London. | *Yes* | "It is now settled as indisputable, both by the usage of nations and the principles of international law, that the open ocean cannot be appropriated by any one Power. But it is also as firmly established that all states possess sovereign rights in those parts of the sea which wash their shores. . . ." (p. 537.) | ". . . sedentary animals connected with the bottom, such as oysters, pearl-oysters, and coral, which are found in shallow water, as a rule, and usually near the coast, . . . are looked upon rather as belonging to the soil or bed of the sea than to the sea itself. This is recognised in municipal law, and international law also recognises in certain cases a claim to such fisheries when they extend along the soil under the sea beyond the ordinary territorial limit. . . . These pearl-fisheries [of Ceylon] are very valuable, and have been treated from time immemorial by the successive rulers of the island as subjects of property and jurisdiction." (pp. 696-97.) |
| 1916 | HERSHEY, Amos S. American professor of international law. *The Essentials of International Public Law*, New York. | *Yes* | "A State's territory is that definite portion of the earth's surface which is subject to its sovereignty or *imperium*." (§ 159, p. 172.) "The territory of a State bordering on the open sea also includes the Territorial or Marginal Sea." (§ 191, p. 195.) | "The Land Domain of a State also includes all islands formed within its territorial waters, and the territorial subsoil beneath its land and water surface." (p. 173.) |

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| 1912 | NYS, Ernest. Belgian law teacher. *Le droit international* (new edition), Brussels. (Translated from 1912 edition. | | "But here it is a matter, in reality, of maritime zones in which the State is able to execute all the orders which it chooses to give and where the right is by no means in contradiction with the fact. Consequently, it is perceived that the integral thesis of sovereignty is sustained." (Vol. 1, p. 558.) | He favors calling the rights of the State a limited sovereignty, although he does not deny a right of ownership. He does not discuss the bed or subsoil. |
| 1913 | von LISZT, Franz, German publicist. *Das Völkerrecht*, 9th revised ed., Berlin. (Translated from the 9th edition.) | *No* | "The territorial waters are not sovereign territory; but the coastal state can exercise certain jurisdictional powers over it." (p. 87.) | "A simple consideration makes it clear that the territorial waters can not absolutely be considered the territory of the coastal State." (p. 87.) Does not discuss the bed or subsoil. |
| 1913 | RAESTAD, Arnold. Norwegian publicist. *La mer territoriale*, Paris. (Translated from the original edition.) | | "From the historical point of view, the territorial sea does not result from an occupation of the sea, but from successive occupations of certain rights in the sea, later joined into a bundle which by general agreement is called sovereignty." (pp. 161-62.) | "While the individual or collective rights in regard to the land are transferred naturally by the existence of the legal institution which is called property: individual property, property of the provinces [*communes*] or of the State, the rights in regard to the sea are more often—with the exception of the interior parts, and according to certain systems, the part nearest to the shore—isolated; they are called right of fishing, right of wreckage, right of navigation, at the most right of usufruct, but not right of property." (p. 150.) (Note that he recognizes right of usufruct. Does not discuss bed or subsoil.) |
| 1914 | STOCKTON, Charles H. American publicist. *Outlines of International Law*, New York. | *Yes* | "*Exclusive Jurisdiction over Its Own Territory.*—It is an exclusive right of jurisdiction of a state, practically speaking, over all territory, things, and persons within its boundaries. . . . Hall defines in more detail the territorial property of a state to consist 'in the territory occupied by the state community and subjected to its sovereignty, and it comprises the *whole* area, whether of land or water, included within definite boundaries, . . . and when such area abuts upon the sea, together with a certain margin of water.' (Hall, 6th ed., Atlay, p. 101.)" (p. 112.) | |

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| 1916 | LORD SHAW, in *Secretary of State for India v. Chellinani Rama Roa*, 43 L.R. (Ind. App.) 192; 39 Indian Law Reports, Madras Series (Jud. Com. of the Privy Council.) | *Yes* | "The Crown is the owner, and the owner in property, of islands arising in the sea within the territorial limits of the Indian Empire. It should be added, with reference to the suggestion that the territory of the Crown ceases at low-water mark, and that the right over what extends seawards beyond that is merely of the nature of jurisdiction or the like, that there are manifest difficulties in seeing what are the grounds for this in principle." (43 L.R. (Ind. App.) at pp. 201-202, 39 I.L.R at p. 628.) | |
| 1916 | PLANAS SUAREZ, Simon. Venezuelan jurist *Tratado de Derecho Internacional Público*, Madrid. (Translated from original edition.) | *Yes* | "That part of the ocean washing the coast of a state and upon which the state exercises its exclusive sovereignty, is called *littoral sea* forming an integral part of the territory of the state that has the legal possession of the said littoral sea." (Vol. I, p. 173.) | |
| 1918 | KOHLER, Josef, German publicist *Grundlagen des Völkerrechts*, Stuttgart. (Translated from the original edition.) | *Yes* | "Even after the ocean became free, territorial waters remained under the territorial sovereignty, as is self-explanatory; for the mutual effects of land on coast and of coast on land are so great, that full territorial sovereignty of the land would be inconceivable if it were cut off sharply at the coast." (p. 105.) "The freedom of the seas is valid for the ocean as a sea, not for the bottom of the sea. Here rights may develop, insofar as the utilization of the sea routes is not affected." (p. 105.) | |
| 1920 | FOULKE, Roland R. American lawyer. *A Treatise on International Law*, Philadelphia. | | "The other [view] is that the absolute and exclusive jurisdiction extends to the edge of the maritime belt, that the waters within which are as much a part of the territory of the state as the land is . . . particularly in view of the fact that the width of the maritime belt is based upon the extent of effective control from the shore, a jurisdiction sustained by artillery, which is about as absolute as any which can be imagined. . . ." (Vol. I, pp. 378-79.) | |
| 1920. | MOYE, Marcel. French law publicist. *Le droit des gens moderne*, Paris. (Translated from original edition.) | *No* | "By virtue of all these reasons and other analogies, for a long time there has been conceded in the littoral State an important right of supervision [*police*] in the littoral sea. It is not that it becomes really the proprietor, but its powers are sometimes very extensive." (p. 260.) (Does not deal with the bed or subsoil.) | |

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| 1920 | OPPENHEIM, Lassa Francis Lawrence. German-English publicist on international law. *International Law*, 3rd ed. by Ronald F. Roxburgh, London. | *Yes* | "Whereas it is nowadays universally recognized that the open sea cannot be State property, such part of the sea as makes the coast waters would, according to the opinion of these writers, actually be the State property of the littoral States, although foreign States have a right of innocent passage for their merchantmen through the coast waters. . . . The real facts of international life would seem to agree with [this] opinion." (Vol. I, p. 333.) "A special part of territory the territorial subsoil is not, although this is frequently asserted. But it is a universally recognised rule of the Law of Nations that the subsoil to an unbounded depth belongs to the State which owns the territory on the surface." (Vol. I, p. 312.) | |
| 1922 | FAUCHILLE, Paul. French publicist. *Traité de droit international public* (8th ed. of *Manuel de droit international public* by Henry Bonfils, rewritten and brought down to date), Paris. (Translated from the 1922 edition.) | *Yes* | "Accordingly, the littoral State is sovereign of the coastal sea as of the mainland; its sovereignty over the coastal sea is as an extension of its sovereignty over its territory; it is a portion of its domain." (Vol. 1, pt. 2, p. 140.) | "The bottom of the territorial sea is, as well as that of the high sea, a thing without master which is of itself susceptible of a distinct occupation." (Vol. 1, pt. 2, p. 204.) "The practice of States has always recognized that the littoral State of the territorial sea alone can proceed to occupy its bed and subsoil." (Vol. 1, pt. 2, p. 205.) |
| 1923 | CRUCHAGA TOCORNAL, Miguel. Chilean jurist. *Nociones de Derecho Internacional*, 3rd ed., Madrid. (Translated from 3rd edition.) | *Yes* | "The principles of freedom of the sea and of the right that all states have to navigate through it today are considered as unquestionable except for the right of national sovereignty of the state over its territorial and interior seas." (Vol. 1, p. 336.) | "The maritime belt that the state is able to defend from its coast constitutes a part of its own territory." (Vol. 1, pp. 328-29.) |
| 1923 | GEMMA, Scipione. Italian publicist on international law. *Appunti di diritto internazionale*, Bologna. (Translated from original edition.) | *Yes* | "It is admitted without discussion that the Nations have a power of exclusive 'imperium' over certain portions of the sea and particularly over the so-called territorial or coastal sea." (p. 185.) | "The limitations implied by the right of innocent passage of foreign vessels and by certain exemptions applicable to them in matters of civil and criminal local jurisdiction exercised by the coastal nations are not enough to consider the littoral sea as something different from the national territory." (p. 187.) |

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| | | | *Sovereignty* | *Ownership* |
| 1923 | HATSCHEK, Julius. German law teacher. *Völkerrecht—Als System Rechtlich Bedeutsamer Staatsake, Leipzig.* (Translated from original edition.) | *Yes* | "Since the unity which constitutes the legal sub-stratum for territorial sovereignty is lacking in the case of the territorial waters, we will have to regard the legal relation of the coastal state to the territorial waters not as a territorial sovereignty, but as a diffusion of the power of the state which is extended *ipso jure*, that is, as a sum of actions in international law, which have only one limitation: they may not injure [*verletzen*,—infringe upon, violate] the communal use of the other states." (pp. 190-91.) | "This view [maintained by some, that no sovereign power exists in the coastal sea] runs counter to the fact that the coastal state may doubtless take produce out of the territorial waters, which goes far beyond the scope of security measures." (p. 190.) Says the floor of the open sea may be occupied: "The power of the state which seeks to expand its territory by the use of the bottom of the sea, collides, in principle, with the rights of no one." (pp. 208-09.) |
| 1923-1924 | HURST, Sir Cecil J. B. English publicist. "Whose Is the Bed of the Sea?" *Brit. Yearbook of Int'l Law*, 1923-24, pp. 34-43. | *Yes* | "Parliament by this legislation [Cornwall Submarine Mines Act, Aug. 2, 1857] has committed itself to the proposition that the bed of the [territorial] sea below low-water mark is vested in the Crown." (p. 34.) States that this proposition is also established by the weight of authority (p. 37). | |
| 1923 | LAWRENCE, Thomas Joseph. English publicist. *The Principles of International Law*, 7th revised ed. by Percy H. Winfield, Boston and London. | *Yes* | "International law regards states as political units possessed of proprietary rights over definite portions of the earth's surface." (p. 136.) Says the State's territory includes the territorial sea, p 138. | |

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| 1924 | FENWICK, Charles G. American professor of international law. *International Law*, New York and London. | | "Within the limits of the marginal sea the jurisdiction of the state is, with but one exception [the right of innocent passage on the part of foreign ships], as exclusive as is its jurisdiction over the land itself." (p. 251.) | He says that international law is not concerned with property rights, and he does not express a view on rights of property in the marginal sea. But he observes that the Roman concept of sovereignty and ownership is still the basis of the territorial rights of states. See pp. 219-221. |
| 1924 | POTTER, Pitman B. American professor of international law. *The Freedom of the Sea in History, Law and Politics*, New York. | | "The definition of the degree of authority enjoyed by the littoral state over its marginal belt is still more difficult. That authority is something less than the authority exercised over the landed domain of the nation." (p. 105.) | Does not discuss rights of property as such, but does say: "Restrictions amounting to exclusion may be imposed upon fishing; upon anchorage, and any other use of the sea-bottom; upon the taking of gems or sponges." (p. 106.) |
| 1925 | EDMUNDS, Sterling E. American professor of international law. *The Lawless Law of Nations*, Washington. | *Yes* | "[A State's territory] is thus made up of the three elements of land domain, fluvial or maritime domain [in which he includes the territorial sea, pp. 90-91] and aerial space. And since jurisdiction is coextensive with territory, at least in the Anglo-American view, the State is said to be supreme within this area." (p. 90.) | |
| 1925 | MOLLER, Axel. Danish publicist on international law. *International Law in Peace and War*, English translation by H. M. Pratt, London, 1931. | | "Over its territorial waters the state exercises a sovereignty, which differs from sovereignty over land territory (and national waters) chiefly in the fact that *innocent passage* (passage inoffensif) through territorial waters cannot be prevented." (Pt. I, p. 149.) | Says that the State's right over its territory, both land and water, is not a right of property but a right of the nature of public law. (Pt. I, p. 148.) But he makes no distinction, in this respect, between its right in the land territory and its territorial waters. |
| 1926 | BONDE, Amédée. French advocate *Traité élémentaire de droit international public*, Paris. (Translated from original edition.) | *No* | "The riparian states exercise a sovereignty restricted to the necessity of assuring respect for their economic interests and the security of persons and property." (p. 130.) | Denies a right of property in the territorial sea because it is not susceptible of appropriation because such a right would interfere with navigation. (p. 148.) Does not deal with the sea-bed or subsoil. |

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| | | | *Sovereignty* | *Ownership* |
| 1926 | LINDLEY, M. F. English barrister. *The Acquisition and Government of Backward Territory in International Law*, London. | *Yes* | "Some writers, including Ortolan and Calvo, while admitting the existence of the territorial sea, deny that it is capable of absolute dominion and property, and allow only the right of jurisdiction. Such an opinion, however, is exceptional, and does not accord with present practice or with history." (p. 63.) | |
| 1926 | VERDROSS, Alfred. Austrian professor of international law. *Die Verfassung der Völkerrechtsgemeinschaft*, Vienna and Berlin. (Translated from original edition.) | *Yes* | Says that principle of freedom of the seas "does not in any way remove the competence of the coastal state over the coastal sea, a right derived from the occupation right." (p. 202.) | ". . . the fundamental maxims of international law concerning the coastal sea are only applications of the generally valid principles of the original occupation right." (p. 205.) "To the coastal sea belong also the air column overhead and the bottom of the sea underneath the same." (p. 210.) |
| 1926 | von WALDKIRCH, E. Swiss publicist. *Das Völkerrecht in seinen Grundzügen dargestellt*, Basle. (Translated from original edition.) | *Yes* | ". . . It is this very rule which is decisive for the view that territorial waters are to be regarded as water territory of a state." (p. 109.) "The territory of the state . . . involves not only the land and water surfaces, but also the interior of the earth and the air space over the defined part of the earth." (p. 105.) | |
| 1927 | JESSUP, Philip C. American jurist and teacher of international law. *The Law of Territorial Waters and Maritime Jurisdiction*, New York. | *Yes* | "Whatever rights, privileges, powers and immunities the law attaches to the owner, those are enjoyed by that nation which is sovereign of the object. In this sense it is believed that a State is sovereign over the territorial sea and over the air space." (pp. 116-117.) | |
| 1928 | PERGLER, Charles. American professor of government. *Judicial Interpretation of International Law in the United States*, New York. | *Yes* | Says the marginal sea is considered a part of the territory of the sovereign (see p. 105). | |

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| 1928 | STRUPP, Karl. German publicist. *Grundzüge des positiven Völkerrechts*, 4th ed., Bonn. (Translated from original edition.) | *Yes* | Adopts theory of "a restricted power of the state over coastal waters in harmony with the actual circumstances," in preference to that of *unrestricted* territorial sovereignty." (p. 83.) | "That the riparian state has certain rights in the coastal waters is justified in my opinion on grounds of security . . . and also in economic reasons." (p. 83.) Recognizes that subsoil of the sea is capable of being property (see p. 101). |
| 1929 | KEITH, A. Berriedale, Ed. English barrister. *Wharton's Elements of International Law*, 6th Eng. ed., rewritten by Keith, London. | *Yes* | "That a State possesses sovereignty over, or internationally property in, its maritime belt is generally admitted, though it has been claimed that the power of the State is limited to control for certain purposes, e. g., neutrality, police, fishery, only." (Vol. I, p. 368.) | |
| 1930 | BUSTAMANTE y SIRVIN, Antonio Sanchez de. Cuban jurist. *La mer territoriale*, French translation from the Spanish, by Paul Goulé, Paris. (Translated from the French edition.) | *Yes* | Summarizes his views in a proposed international code: "The State exercises over its maritime territory all sorts of rights, without other limitations than those established in its internal laws, in its treaties in force, or in the provisions of the present code." (p. 158.) | "The maritime territory includes not only the waters mentioned . . . but their bed and subsoil and the aerial space above them." (p. 158.) |
| 1930 | SODERQUIST, Nils. Swedish publicist. *Droit international maritime suédois*, Paris. Translated from original edition.) | *Yes* | "We are going to see soon that there is in Sweden an abundance of legislative acts including the coastal sea in the national territory. I have nevertheless thought it necessary to establish that this is a reasonable conception and one to which no State is opposed." (p. 61.) | The denomination of territorial sea is very appropriate to characterize this water. The noun *sea* describes it as a part of the larger region of maritime right, the adjective *territorial* brings out that it enters into the national domain by the same title as territory in general." (pp. 61-62.) This also includes the subsoil (p. 95). |
| 1931 | STOWELL, Ellery C. American teacher of international law. *International Law, a Restatement of Principles in Conformity with Actual Practice*, New York. | | "The sovereign jurisdiction over these marginal seas is essentially the same as that exercised on land, namely, the right to make and enforce reasonable regulations to govern all those who enter the specified regions." (p. 57.) | Does not discuss right of property, as such, but inference is that the marginal sea is a part of the territory in the same manner as the land. See, e. g., footnote 4, p. 57. |

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| | | | *Sovereignty* | *Ownership* |
| 1932 | FOIGNET, René. French law teacher. *Manuel élémentaire de droit international public*, 15th ed. revised by E. Dupont, Paris. (Translated from the 15th edition.) | | "According to a third opinion which prevails today, the riparian state would have, in default of sovereignty, a power of police and of security which would permit it to take all convenient measures to shelter itself from the danger which might menace it from the sea side." (p. 284.) | Although he expresses a lack of full sovereignty over the territorial sea, he lists it as a part of the territory of the State. See p. 260. |
| 1932-1934 | GIDEL, Gilbert. French professor of international law. *Le droit international public de la mer*, Chateauroux. The most exhaustive treatise written on the subject. (Translated from original edition.) | *Yes* | ". . . The territorial sea forms a part of the territory and is subject to the sovereignty of the littoral State." (Vol. 3, p. 154.) He says the territorial sea is essentially a submerged part of the land territory. See Vol. 3, pp. 168-69. | "In our opinion, . . . the rights of the littoral State in the subsoil of the territorial sea are rights which are associated with the status of the terrestrial sphere [*milieu*] and not that of the maritime sphere. The terrestrial territory of a State includes the subsoil covered by . . . the territorial sea to its outer boundary." (Vol. 3, p. 331.) |
| 1932 | HOLD-FRENECK, Alexander. Austrian teacher of international law. *Lehrbuch des Völkerrechts*, Leipzig. (Translated from original edition.) | *Yes* | "The sovereign waters form territory of the littoral state, its territorial sovereignty extends to the inward waters and coastal sea." (Vol. 2, p 62.) | |
| 1933 | BALDONI, Claudio. Italian publicist on international law. "Les navires de guerre dans les eaux territoriales étrangères," 65 *Recueil des cours, Académie de droit international*, pp. 185-303. (Translated from the French.) | *Yes* | "Indeed, the limits imposed by general international law on the activity of the littoral State in the territorial sea do not constitute an exclusive characteristic of this latter and cannot, as a consequence, impress on it a juridical nature other than that which is peculiar to the terrestrial territory." (p. 200.) | |

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| 1933 | FEDOZZI, Prospero. Italian publicist on international law. *Introduzione al diritto internazionale e parte general*, 2nd ed., Padua. (Translated from 2nd edition.) | *Yes* | "The acceptance of the principle that establishes that the state exercises over its territorial waters the same right of sovereignty as over the land territory deprives the distinction among the various physical parts of those waters of all usefulness." (p. 386.) | "The principle of territoriality is applied always without question to the bed of the territorial waters and to the subsoil under such waters in relation with any form of utilization (fisheries, mineral deposits, submarine galleries under straits or maritime channels)." (pp. 409-410.) |
| 1935 | SMITH, H. A. English publicist on international law. *Great Britain and the Law of Nations*, London. | *Yes* | ". . . In the view of the British government the bed and subsoil of the sea within territorial waters have always been regarded as the property of the Crown and subject to the jurisdiction of Parliament." (Vol. II, p. 141.) | |
| 1938 | BINGHAM, Joseph Walter. American publicist on international law. *Report on the International Law of Pacific Coastal Fisheries*, Stanford. | *Yes* | "The open sea is susceptible of jurisdiction . . . and is susceptible of property also." Says that modern state practice concedes to a coastal state jurisdiction and property in fisheries and other sea resources in its coastal waters. (p. 47.) | |
| 1938 | FRANCOIS, J. P. A. Dutch diplomat and international law authority. "Règles générales du droit de la paix," 66 *Recueil des cours, Académie de droit international*, pp. 1-294. (Translated from the French.) | *Yes* | "It is almost universally admitted that the authority exercised by the State in the territorial waters is of the same character as that which it exercises in its terrestrial domain. This zone constitutes a part of the territory and, as such, is subject to the sovereignty of the littoral State." (p. 47.) | |
| 1938 | URSUA, Francisco A. Mexican jurist. *Derecho Internacional Público*, Mexico. (Translated from original edition.) | *Yes* | Says that some authors have claimed that territorial waters "neither can be the object of property nor therefore fall under identical jurisdiction as that exercised over territory," but he says that "This solution is unacceptable." (pp. 174-75.) | |

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| | | | *Sovereignty* | *Ownership* |
| 1940 | IRELAND, Gordon. American law professor, "Marginal Seas around the States," 2 *Louisiana Law Rev.* 252, 436. | *Yes* | "In the United States . . . always the decision by executive, legislative or judicial authority, in court or other tribunal, has been consistent with a theory of original absolute ownership by the sovereign state." (pp. 267-68.) | |
| 1942 | BRIERLY, J. L. English professor of international law. *The Law of Nations*, 3rd ed., Oxford. | *Yes* | "The doctrine which finds most support in the practice of states is that territorial waters form part of the territory of a state as fully as does its land territory, except that there exists a right of 'innocent passage' through them for the ships of other states." (p. 143.) | |
| 1943 | TOMASEVICH, Joso, *International Agreements on Conservation of Marine Resources*, Stanford. | *Yes* | "This line [separating the contiguous waters from the high seas] decides the extent of territorial waters in which the coastal state has rights of exclusive jurisdiction and exploitation of resources in and under the sea." (p 21.) | |
| 1944 | LEONARD, L. Larry, *International Regulation of Fisheries*, Washington. | *Yes* | "Since a state exercises sovereign rights over its territorial waters there is no doubt that the fisheries within these waters are subject to that state's exclusive regulation." (pp. 9-10.) | ". . . the fishery within the territorial waters has been recognized as the exclusive property of the littoral state." (p. 11.) |
| 1944 | SCELLE, Georges. French authority on international law. *Droit International public*, Paris. (Translated from original edition.) | *Yes* | His view is that "there is an indivisibility between the territorial sea and the high sea;" but he recognizes that: "From the point-of-view of positive law in force, it seems useless to rebel against the fact that *the unanimity of governments* and the great majority of the doctrine consider: 1st, that the territorial sea *is a part of the territory;* 2nd, that it constitutes a domain *of the sovereign State.* . . . There is an indivisibility between the territory properly speaking and the submarine zone covered by water; it is 'submerged territory' as the soil of the interior waters (ports) and the bed of the rivers or lakes." (p. 319.) | |

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| 1945 | HYDE, Charles C. American international law publicist. *International Law*, 2nd ed, Boston. This is best American treatise. | *Yes* | "With the understanding that the marginal sea is a part of the territory of the adjacent State, the contrasting aspect of the high sea, even where contiguous to territorial waters, is accentuated. The latter belongs to no State and is, therefore, subject to the control of none. The former does belong to a State and is, accordingly, subject to a large measure of its control." (Vol. 1, p. 461.) "The territory of a State consists in part of the area, both land and water. . . . There may be even more—the subsoil appurtenant to a coast and extending therefrom into an area beneath the sea." (Vol. 1, p. 467.) "The subsoil appurtenant to the coast of a State and extending therefrom into an area beneath the high sea is doubtless susceptible to acquisition by that State." (Vol. 1, p. 468.) |
| 1945 | KELSEN, Hans. Viennese-American. World-wide authority on jurisprudence and international law. *General Theory of Law and State*, Cambridge. | *Yes* | "The territorial waters (the maritime belt) legally belong to the territory of the littoral States, but the latter are here, according to international law, subjected to certain restrictions." (Innocent passage, etc.) (p. 211.) |
| 1946 | BALLADORE PALLIERI, G. Italian professor of international law. *Diritto Internazionale Pubblico*, 4th ed., Milan. (Translated from 4th edition.) | *Yes* | "The right of sovereignty . . . includes not only a right similar to the right of ownership, governed by the domestic laws, but a right more complete than the proprietary rights." (p. 403.) "The subsoil of the high seas can be subject to the right of property and any state that has acquired sovereignty over a part of that subsoil can use it for any purpose whatever if this utilization does not hamper the free use of the sea on the part of other states." (p. 379.) |
| 1946 | BORCHARD, Edwin. American law professor and publicist. "Resources of the Continental Shelf," 40 *Am. Jour. of Int'l Law*, pp. 53-70. | *Yes* | "Here there is both *imperium* and *dominium*. . . . The soil and subsoil wealth within reach of the shore was uniformly claimed by the riparian state." (p. 59.) |
| 1947 | FLORIO, Franco. Italian jurist. *Il mare territoriale e la sua delinitazione*, Milan. Translated from original edition.) | *Yes* | "The final consequence of the absolute right of the State over its territorial sea is that the same 'jus dominii' and 'jus imperii' over it must be considered as extending to the bed and subsoil beneath the sea as well as to the space over it." (p. 38.) |

| Year | Authority | Recognizes Both Ownership and Sovereignty | References and Quotations | |
|---|---|---|---|---|
| | | | *Sovereignty* | *Ownership* |
| 1947 | ROSS, Alf. Danish authority on international law. *A Textbook of International Law* (translated from the Danish by the author), London, New York and Toronto. | *Yes* | "The *geographical territory* of a state is usually divided into three parts: the land territory, the territorial waters, and the national waters. To this may be added as accessories the air space over and the subsoil under the territory." (p. 139.) | |
| 1947 | STARKE, J. G. English barrister. *An Introduction to International Law*, London. | *Yes* | "The principle of sovereignty over the maritime belt thus developed contemporaneously and coextensively with the doctrine of the freedom of the seas." (p. 115.) | "As to the surface and sub-soil of the sea-bed of the maritime belt, these belong absolutely to the littoral State." (p. 120.) |
| 1948 | LAUTERPACHT, H. English. World-recognized authority on international law. *International Law*, by L. Oppenheim, 6th ed., edited by H. Lauterpacht, London, New York and Toronto. | *Yes* | "Many writers maintain that such sway is sovereignty, that the maritime belt is a part of the territory of the littoral State, and that the territorial supremacy of the latter extends over its coast waters . . . The practice of States seems to agree with [this] view." (Vol. I, pp. 442-43.) | "Supporters of that view rightly maintain that the universally recognised fact of the exclusive right of the littoral State to appropriate the natural products of the sea in the coast waters, especially the use of the fishery therein, is consistent only with the territorial character of the maritime belt." (Vol. I, p. 143.) ". . . the subsoil beneath the territorial land and water is an appurtenance of such territory." (Vol. I, p. 577) |
| 1949 | SCHWARZENBERGER, Georg. English professor of international law. *International Law*, 2nd ed., London. | *Yes* | "In principle, there is no difference between the rights exercised by a State over its land territory and the rights which it possesses within its maritime territory." (Vol. I, p. 149.) | |

## UNRATIFIED TREATY OF 1844

**A Treaty of Annexation, Concluded between the United States of America and the Republic of Texas, at Washington, the 12th day of April, 1844.**

The people of Texas having, at the time of adopting their Constitution, expressed, by an almost unanimous vote, their desire to be incorporated into the Union of the United States, and being still desirous of the same with equal unanimity, in order to provide more effectually for their security and prosperity; and the United States, actuated solely by the desire to add to their own security and prosperity, and to meet the wishes of the Government and people of Texas, have determined to accomplish, by treaty, objects so important to their mutual and permanent welfare.

For that purpose, the President of the United States has given full powers to John C. Calhoun, Secretary of State of the said United States, and the President of the Republic of Texas has appointed, with like powers, Isaac Van Zandt and J. Pinckney Henderson, citizens of the said Republic; and the said plenipotentiaries, after exchanging their full powers, have agreed on and concluded the following articles:

### Article 1.

The Republic of Texas, acting in conformity with the wishes of the people and every department of its Government, cedes to the United States all its terri-

tories, to be held by them in full property and sovereignty, and to be annexed to the said United States as one of their Territories, subject to the same constitutional provisions with their other Territories. This cession includes all public lots and squares, vacant lands, mines, minerals, salt lakes and springs, public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and accoutrements, archives and public documents, public funds, debts, taxes and dues unpaid at the time of the exchange of the ratifications of this treaty.

## Article II.

The citizens of Texas shall be incorporated into the Union of the United States, maintained and protected in the free enjoyment of their liberty and property, and admitted, as soon as may be consistent with the principles of the Federal Constitution, to the enjoyment of all the rights, privileges, and immunities, of citizens of the United States.

## Article III.

All titles and claims to real estate, which are valid under the laws of Texas, shall be held to be so by the United States; and measures shall be adopted for the speedy adjudication of all unsettled claims to land, and patents shall be granted to those found to be valid.

## Article IV.

The Public lands hereby ceded shall be subject to the laws regulating the public lands in the other Ter-

ritories of the United States, as far as they may be applicable; subject, however, to such alterations and changes as Congress may from time to time think proper to make. It is understood between the parties, that, if in consequence of the mode in which lands have been surveyed in Texas, or from previous grants or locations, the sixteenth section cannot be applied to the purpose of education, Congress shall make equal provision by grant of land elsewhere. And it is also further understood, that, hereafter, the books, papers, and documents of the General Land Office of Texas shall be deposited and kept at such place in Texas as the Congress of the United States shall direct.

## Article V.

The United States assume and agree to pay the public debts and liabilities of Texas, however created, for which the faith or credit of her Government may be bound at the time of the exchange of the ratifications of this treaty; which debts and liabilities are estimated not to exceed, in the whole, ten millions of dollars, to be ascertained and paid in the manner hereinafter stated.

The payment of the sum of three hundred and fifty thousand dollars shall be made at the Treasury of the United States, within ninety days after the exchange of the ratifications of this treaty, as follows: Two hundred and fifty thousand dollars to Frederick Dawson, of Baltimore, or his executors, on the delivery of that amount of ten per cent. bonds of Texas; one hundred thousand dollars, if so much

be required, in the redemption of the exchequer bills which may be in circulation at the time of the exchange of the ratifications of this treaty. For the payment of the remainder of the debt and liabilities of Texas, which, together with the amount already specified, shall not exceed ten millions of dollars, the public lands herein ceded, and the nett revenue from the same, are hereby pledged.

## Article VI.

In order to ascertain the full amount of the debts and liabilities herein assumed, and the legality and validity thereof, four commissioners shall be appointed by the President of the United States, by and with the advice and consent of the Senate, who shall meet at Washington, Texas, within the period of six months after the exchange of the ratifications of this treaty, and may continue in session not exceeding twelve months, unless the Congress of the United States should prolong the time. They shall take an oath for the faithful discharge of their duties, and that they are not directly or indirectly interested in said claims at the time, and will not be during their continuance in office; and the said oath shall be recorded with their proceedings. In case of the death, sickness or resignation of any of the commissioners, his or their place or places may be supplied by the appointment as aforesaid or by the President of the United States during the recess of the Senate. They, or a majority of them, shall be authorized, under such regulations as the Congress of the United States may prescribe, to hear, examine and decide on all

questions touching the legality and validity of said claims, and shall, when a claim is allowed, issue a certificate to the claimant, stating the amount, distinguishing principal from interest. The certificates so issued shall be numbered, and entry made of the number, the name of the person to whom issued, and the amount, in a book to be kept for that purpose. They shall transmit the records of their proceedings and the book in which the certificates are entered, with the vouchers and documents produced before them, relative to the claims allowed or rejected, to the Treasury Department of the United States, to be deposited therein, and the Secretary of the Treasury shall, as soon as practicable after the receipt of the same, ascertain the aggregate amount of the debts and liabilities allowed; and if the same, when added to the amount to be paid to Frederick Dawson and the sum which may be paid in the redemption of the Exchequer bills, shall not exceed the estimated sum of ten millions of dollars, he shall, on the presentation of a certificate of the commissioners, issue, at the option of the holder, a new certificate for the amount, distinguishing principal from interest, and payable to him or order, out of the nett proceeds of the public lands, hereby ceded, or stock, of the United States, for the amount allowed, including principal and interest, and bearing an interest of three per cent. per annum from the date thereof; which stock, in addition to being made payable out of the nett proceeds of the public lands hereby ceded, shall also be receivable in payment for the same. In case the amount of the debts and liabilities allowed, with the sums aforesaid to be paid to Frederick Dawson and

which may be paid in the redemption of the Exchequer bills, shall exceed the said sum of ten millions of dollars, the said Secretary, before issuing a new certificate, or stock, as the case may be, shall make in each case such proportionable and rateable reduction on its amount as to reduce the aggregate to the said sum of ten millions of dollars, and he shall have power to make all needful rules and regulations necessary to carry into effect the powers hereby vested in him.

## Article VII.

Until further provision shall be made, the laws of Texas as now existing shall remain in force, and all executive and judicial officers of Texas, except the the President, Vice-President and Heads of Departments, shall retain their offices, with all power and authority appertaining thereto, and the Courts of justice shall remain in all respects as now established and organized.

## Article VIII.

Immediately after the exchange of the ratifications of this treaty, the President of the United States, by and with the advice and consent of the Senate, shall appoint a commissioner who shall proceed to Texas, and receive the transfer of the territory thereof, and all the archives and public property and other things herein conveyed, in the name of the United States. He shall exercise all executive authority in said territory necessary to the proper execution of the laws, until otherwise provided.

## Article IX.

The present treaty shall be ratified by the contracting parties and the ratifications exchanged at the City of Washington, in six months from the date hereof, or sooner if possible.

In witness whereof, we, the undersigned plenipotentiaries of the United States of America and of the Republic of Texas, have signed, by virtue of our powers, the present treaty of Annexation, and have hereunto affixed our seals respectively.

Done at Washington, the twelfth day of April, eighteen hundred and forty-four.

[Seal] J. C. Calhoun

[Seal] Isaac Van Zandt

[Seal] J. Pinckney Henderson

## ANNEXATION AGREEMENT

*Joint Resolution of the Congress of the United States, March 1, 1845, 28th Congress, 2nd Session. 5 U. S. Stat. 797.*

**Joint Resolution for annexing Texas to the United States**

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new state, to be called the state of Texas, with a republican form of government, to be adopted by the people of said republic, by deputies in Convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the states of this Union.

2. And be it further resolved, That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to wit: *First*—said state to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments; and the constitution thereof, with the proper evidence of its adoption by the people of said republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action, on or before the first day of January, one thousand eight hundred and forty-six. *Second*—said state, when ad-

mitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind which may belong to or be due and owing said republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said republic of Texas; and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said state may direct; but in no event are said debts and liabilities to become a charge upon the government of the United States. *Third*—New states, of convenient size, not exceeding four in number, in addition to said state of Texas, and having sufficient population, may hereafter, by the consent of said state, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the federal constitution. And such states as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri compromise line, shall be admitted into the Union with or without slavery, as the people of each state asking admission may desire. And in such state or states as shall be formed out of said territory north of said Missouri compromise line, slavery, or involuntary servitude, (except for crime,) shall be prohibited.

3. And be it further resolved, That if the President of the United States shall in his judgment and

discretion deem it most advisable, instead of proceeding to submit the foregoing resolution to the Republic of Texas, as an overture on the part of the United States for admission, to negotiate with that Republic; then, Be it resolved, that a state, to be formed out of the present Republic of Texas, with suitable extent and boundaries, and with two representatives in Congress, until the next apportionment of representation, shall be admitted into the Union, by virtue of this act, on an equal footing with the existing states, as soon as the terms and conditions of such admission, and the cession of the remaining Texan territory to the United States shall be agreed upon by the governments of Texas and the United States: And that the sum of one hundred thousand dollars be, and the same is hereby, appropriated to defray the expenses of missions and negotiations, to agree upon the terms of said admission and cession, either by treaty to be submitted to the Senate, or by articles to be submitted to the two Houses of Congress, as the President may direct.

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*Joint Resolution of the Congress of Texas, June 23, 1845. 2 Gammel's Laws of Texas 1225.*

**Joint Resolution Giving the consent of the existing Government to the Annexation of Texas to the United States.**

Whereas, the Government of the United States hath proposed the following terms, guarantees, and conditions, on which the people and Territory of the Republic of Texas may be erected into a new State,

to be called the State of Texas, and admitted as one of the States of the American Union, to wit: [Quoted here was all of the Joint Resolution of the Congress of the United States of March 1, 1845, except paragraph 3.] And whereas, by said terms, the consent of the existing government of Texas is required,—Therefore,

Be it resolved by the Senate and House of Representatives of the Republic of Texas in Congress assembled, That the Government of Texas doth consent, that the People and territory of the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of Government, to be adopted by the People of said Republic, by Deputies in Convention assembled, in order that the same may be admitted as one of the States of the American Union; and said consent is given on the terms, guarantees, and conditions set forth in the Preamble to this Joint Resolution.

Sec. 2. Be it further resolved, That the Proclamation of the President of the Republic of Texas, bearing date May fifth, eighteen hundred and forty-five, and the election of Deputies to sit in Convention, at Austin, on the fourth day of July next, for the adoption of a Constitution for the State of Texas, had in accordance therewith, hereby receives the consent of the existing Government of Texas.

Sec. 3. Be it further resolved, That the President of Texas is hereby requested immediately to furnish the Government of the United States, through their

accredited Minister near this Government, with a copy of this Joint Resolution; also to furnish the Convention to assemble at Austin on the fourth of July next, a copy of the same.—And the same shall take effect from and after its passage.

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*Ordinance of the Convention of Texas, July 4, 1845. 2 Gammel's Laws of Texas 1228.*

**An Ordinance.**

Whereas the Congress of the United States of America has passed resolutions providing for the annexation of Texas to that Union, which resolutions were approved by the President of the United States on the first day of March one thousand eight hundred and forty-five; and whereas the President of the United States has submitted to Texas the first and second sections of the said resolution, as the basis upon which Texas may be admitted as one of the States of the said Union; and whereas the existing government of the Republic of Texas has assented to the proposals thus made, the terms and conditions of which are as follows,

[Quoted here was all of the Joint Resolution of the Congress of the United States of March 1, 1845, except paragraph 3.]

Now, in order to manifest the assent of the people of this Republic as required in the above recited portions of the said resolutions; We the deputies of the people of Texas in convention assembled, in their

name and by their authority, do ordain and declare, that we assent to, and accept the proposals, conditions and guarantees contained in the first and second sections of the resolution of the Congress of the United States aforesaid.

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*Joint Resolution of the Congress of the United States, December 29, 1845, 1st Session. 9 U. S. Stat. 108.*

**Joint Resolution for the admission of the state of Texas into the Union.**

Whereas, the Congress of the United States, by a Joint Resolution approved March the first, eighteen hundred and forty-five, did consent that the territory properly included within, and rightfully belonging to the Republic of Texas, might be erected into a new state, to be called *The State of Texas*, with a republican form of government, to be adopted by the people of said republic, by deputies in Convention assembled, with the consent of the existing government, in order that the same might be admitted as one of the states of the Union; which consent of Congress was given upon certain conditions specified in the first and second sections of said Joint Resolution: And whereas, the people of the said Republic of Texas, by deputies in Convention assembled, with the consent of the existing government, did adopt a Constitution and erect a new state, with a republican form of government, and in the

name of the people of Texas, and by their authority, did ordain and declare, that they assented to and accepted the proposals, conditions, and guarantees contained in said first and second sections of said resolution: And whereas the said Constitution, with the proper evidence of its adoption by the people of the republic of Texas, has been transmitted to the President of the United States, and laid before Congress, in conformity to the provisions of said Joint Resolution:

Therefore

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of Texas shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever.

## Summary of Disputed Fact Conclusions Contained in Plaintiff's Brief

The following chart has been prepared to summarize some of Plaintiff's conclusions of fact and the nature of the controverting evidence that the defendant seeks an opportunity to develop through trial:

| Fact Conclusions of Plaintiff in its brief: | Defendant's evidence will show: |
|---|---|
| pp. 23, 28—The purpose of retention by the State of "vacant and unappropriated lands" was to pay the debts of Texas, and residue of the lands to be disposed of as the State might direct. | The purpose of the reservation of "vacant and unappropriated lands" was to allow the State to retain all lands within its limits not expressly ceded. The State was to retain its lands and could use the proceeds from sale of lands or any other funds to pay its debts. |
| p. 28—The parties to the agreement had in mind salable lands. | The parties had in mind all the lands within the limits of Texas not expressly ceded. Much of the land in Texas was not then regarded as salable in the near future. |
| pp. 28, 33—"In 1845, however, lands under the sea were clearly not regarded as valuable or salable." | The land under the sea was known to be valuable in 1845 and the resources thereof were used by the people of Texas. Oil therein was known and put to valuable uses as were shell, sand and gravel and sedentary fish. |
| pp. 30, 28, 31—The phrase "vacant and unappropriated lands" "was considered the equivalent of 'public lands.'" | Although the land in controversy was included within either phrase, the United States Congress placed "vacant and unappropriated lands" in the final draft in lieu of the other phrase. |
| pp. 32, 47—"The Republic of Texas apparently did not include the marginal sea area in its public land system" and did not administer them as part of its public lands. | The Republic specifically provided that lands under navigable waters were not subject to sale. They were to be held in trust for the benefit of the people of Texas. |
| p. 34—"The State's attempt to include the Gulf lands in its public domain seems to be a relatively recent innovation." | The State and the Republic have always included Gulf lands within its public domain, and treated it as such. |

| Fact Conclusions of Plaintiff in its brief: | Defendant's evidence will show: |
|---|---|
| pp. 35, 43—The reservation of "vacant and unappropriated lands" "could not have been designed to include submerged lands in the Gulf." | The intention of the parties was to reserve to Texas all lands within its limits, including the submerged lands in the Gulf. Certainly the land was not ceded to the United States. |
| pp. 35, 38, 66—The Annexation Agreement expressly required ports and harbors to be ceded to the United States. | The Annexation Agreement required a cession to the United States of only those sections of ports and harbors used exclusively by the Texas Navy as part of defense installations. |
| p. 37—"Rights claimed by littoral nations in their marginal seas have from their inception been recognized as pertaining to their national defense." | The customs and usages of nations as well as records of international practice show that submerged lands in the marginal belt were subject to ownership and that such ownership was for beneficial use as well as defense, the latter being a governmental power severable from the former. |
| pp. 38, 66—"It is reasonable to suggest that the territorial sea was ceded expressly as 'other property and means pertaining to the national defense.'" | All property intended to be ceded for defense purposes was inventoried, titles examined, and official exchanges made. It did not include, and the parties did not intend for it to include, the lands and minerals in controversy. |
| pp. 38, 56, 59—"If the general phrase 'vacant and unappropriated lands' had been thought to include the marginal belt, the obvious objection, from the United States' point of view, would have been that such lands were essential to the United States in its conduct of national defense and foreign relations." | No such objection was ever made. It was never thought that the ownership of submerged lands was essential, nor it is now essential to the conduct of national defense and foreign relations. No interference with these powers has occurred while the State administered the lands, and if it did occur, the interference could be prevented by court action or otherwise. |
| pp. 39, 66—"The boundary clause . . . does more than merely reserve to the United States one specific matter involving foreign affairs." | The sole purpose of including the boundary adjustment clause was to allow the United States to settle the boundary between Texas and Mexico, which was accomplished by the Treaty of Guadalupe Hidalgo. |

| Fact Conclusions of Plaintiff in its brief: | Defendant's evidence will show: |
|---|---|
| pp. 44, 47, 54—"There is the gravest doubt, however, whether the Republic had, or ever asserted, any valid claim to ownership and there is also a serious question even as to the logically antecedent issue of jurisdiction." | The Republic of Texas asserted ownership of the submerged lands within its limits and the customs and usages of nations, as well as records of international practice, show that submerged lands within the marginal belt were within the jurisdiction of the adjacent nation and were susceptible of ownership. |
| pp. 45, 49—"Texas treaties clearly did not affirm jurisdiction over, or property rights in, the marginal sea." | Texas' claim to the marginal sea was known to the major nations of the world and was acquiesced in at the time the treaties were concluded. |
| p. 50—"The 1819 treaty fixed the boundary *at* the Gulph of Mexico, and not three miles or three leagues from shore." | The 1819 treaty fixed the boundary "on the Gulf of Mexico. . . . in the sea." The declared purpose of the 1819 treaty was to fix only a part and not the whole of this boundary line. |

In addition to the facts that have been noticed, plaintiff's brief contains a number of mixed conclusions of law and fact from which the defendant has been unable to separate the facts.

## The Mineral Estate in Texas Submerged Lands*

Texas obtained its original system of mineral law from its predecessor Spanish and Mexican sources. Under this law the sovereign was the owner in place of the minerals in all lands within its boundaries, whether they be public, private, or common lands. This Spanish mineral law applied to Texas when it, as a part of Mexico, was under the dominion of Spain. That law remained in effect when Mexico achieved its independence from Spain in 1821 and when Texas won its independence from Mexico in 1836. The Texas Constitution of 1836 provided:

> "All laws now in force in Texas and not inconsistent with this Constitution shall remain in full force until declared void, repealed, altered, or expire by their own limitations."[1]

The Spanish-Mexican mineral concepts had become so fixed in the property law of Texas that they were specifically retained when the common law was otherwise adopted by the Republic of Texas in 1840. Its adoption of the common law in that year specifically provided that it did not apply to "such laws as relate to the reservation of islands, salt lakes, licks, and salt springs, mines and *minerals of every description* made by the general and State governments."[2]

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* Prepared in collaboration with Julius F. Franki, former Assistant to the United States Ambassador in Santiago, Chile, and authority on Spanish land titles.

[1] Gammel's Laws of Texas 1077.

[2] Laws, Republic of Texas, 7th Cong., 1840, 3, 4; 2 Gammel's Laws of Texas 177.

This separate ownership of mines and minerals was recognized by the United States in the draft of the original treaty for annexation of Texas which provided for cession of all its territories to the United States, "including vacant lands, mines, minerals," etc.[3] Mines and minerals were enumerated separately from lands. This treaty was defeated by the United States Senate. The counter-proposal made in the form of a Joint Resolution by the United States Congress provided that Texas retain its "vacant and unappropriated lands" and pay its own debts. It is highly significant that practically all of the many drafts of this counter-proposal contained a cession of "mines and minerals" along with forts, navy, customhouses, etc. They were again enumerated and considered separately from lands. However, the "mines and minerals" were stricken from the Resolution before final passage in the House, and their omission was specifically noted with apparent approval in the Senate.[4] Thus, the final Annexation Agreement, adopted by the Congress of the United States and later approved by Joint Resolution of the

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[3] 4 Miller, *Treaties and Other International Acts of the United States of America* (G.P.O., 1934) 697.

[4] These drafts are found in the Congressional Globe, 28th Cong., 2nd Sess., on the following pages: (1) p. 26, resolution by Mr. Ingersoll; (2) p. 65, resolution by Mr. Douglass; (3) p. 76, resolution by Mr. Tibbetts; (4) p. 85, amendment of Mr. Douglass; (5) p. 129, resolution by Mr. Brown; (6) p. 140, resolution by Mr. Burke. The wording "all mines, minerals, salt lakes and springs" included in Mr. Brown's original draft was eliminated in his substitute draft adopted on January 28, 1845. Congressional Globe, 28th Cong., 2d Sess. 193. This omission was specifically noted in the debate on the House Resolution in the Senate. Congressional Globe, 28th Cong., 2d Sess.

Congress of the Republic of Texas,[5] not only left to the State its vacant and unappropriated lands but also its separate estate in the mines and minerals.

As a part of the annexation procedure, Texas adopted a new Constitution which was approved by the United States Congress. It included these provisions:

> "The rights of property . . . which have been acquired under the Constitution and laws of the Republic of Texas . . . shall remain precisely in the situation which they were before the adoption of this Constitution."[6]

> "All laws and parts of laws now in force in the Republic of Texas . . . shall continue and remain in force as the laws of this State. . . ."[7]

So fixed was the law of sovereign ownership of the minerals in Texas that a constitutional provision was necessary in order to effect a release of minerals to the then private owners of the soil when such action was deemed advisable in 1866.[8] Similar releases were made in 1869 and 1876. As later held in *Cox v. Robison*, 105 Tex. 126, 150 S. W. 1149 (1912), these releases applied only to minerals in lands on which title to the surface had previously

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[5] United States Resolution, 5 Stat. 797 (1845); Texas Resolution, Laws, Republic of Texas, 9th Cong. Ex. Sess., 1845, 4; 2 Gammel's Laws of Texas 1201.

[6] Art. VII, Sec. 20, Cosntitution of 1845; 2 Gammel's Laws of Texas 1293-94.

[7] Art. XIII, Sec. 2, Constitution of 1845; 2 Gammel's Laws of Texas 1299.

[8] Art. VII, Sec. 39, Constitution of 1866; 5 Gammel's Laws of Texas 880.

passed from the sovereign. They were retrospective, not prospective, and did not amount to a union or merger of the mineral estate and the surface of the State's unsold lands.

*History of Sovereign's Separate Mineral Estate*

"In Spain, as early as the eleventh century the regalian system appeared, when the *Fuero Viejo* of Castile left the subsoil from the surface and decreed that 'all the mines of gold, and of silver, and of lead, and of whatsoever other mineral in the dominions of the king, no one shall venture to work them without license from the king.' "[9] And in that monumental compilation of Spanish law which was made in 1263 and published in the reign of Alphonso XI known as the *Siete Partidas*, it is recognized that the mines and minerals were the property of the King. Law V, Title 15 of Partida 2, with reference to land grants provided:

> ". . . and [the King shall have the disposal of] mines if there be any and although it be not mentioned in the grant, that the King retains to himself the things above mentioned . . ."[10]

Francisco Javier Gamboa, outstanding commentator of Spanish mining laws, referred to this Article in his commentaries on the Mining Ordinances by saying:

> "The *Ley de Partida* vested *ownership* of the mines in the King; therefore, they were held not

[9] Richard C. Backus and Phanor J. Eder, *A Guide to the Law and Legal Literature of Colombia* (Washington, 1943), 71-72.

[10] Gregorio Lopez, ed., *Las Siete Partides* (Valladolid, Diego Fernandez de Cordova, 1587), vol. 1, 50.

> to pass in a grant although not excepted out of the grant. Even though included, the grant was valid only during the lifetime of the granting Sovereign and required confirmation by his successors."[11]

The patrimonial right of the crown to subsoil products was clearly expressed once more in the *Ordenamiento de Las Leyes de Alcalda* of 1386; one year later followed the first tax resulting from mining legislation, established by John I in Briviescas. The decree contained the following words:

> "All minerals of gold, silver, lead and any other metal whatsoever *in our realm* belong to us; therefore, no one shall presume to work them without our special license and command . . ."[12]

Subsequent ordinances and the nature of the rights vested in the crown, both as to Spain and its colonial possessions in the Americas, are best described by Gamboa in his *Commentaries on the Mining Ordinances of Spain* (1761), translated in Rockwell's *Spanish and Mexican Law* (1851). Rockwell describes Señor Gamboa as "the paramount authority in all doubtful cases in mining affairs . . . regarded with the highest respect, and was and is still, constantly referred to in the courts of Mexico, and

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[11] Francisco Javier Gamboa, *Commentarios a las Ordenanzas de Mines* (Madrid, Joaquin Ibarra, 1761) 11-12.

[12] Laws 47 and 48, title 38 of the Ordenamiento de Alcalda in *Novísima Recopilación de las Leyes de España* (Madrid, 1805) vol. 4, book 9, 336.

as is presumed, of the other new republics of America also, as a great authority on such subjects." Gamboa says:

"In Spain, under the law of the *Partida*, the *property* of the mines was so *vested* in the king that they were held not to pass in a grant of the land, although not excepted out of the grant; and even though included in it, the grant was valid, as to them, only during the life of the king who made it, and required confirmation by his successors . . . .

"Afterwards, by a law of Don Alphonso XI. in the *Ordenamiento Real*, copied in the collection of Castile, all mines of gold, silver or any other metal whatsoever, and the produce of the same, were declared to be the *property* of the crown, and no one was to presume to work them, except under some especial license or grant, previously obtained, or unless authorized by immemorial prescription.

"This rule was moderated by John I., and the law as established by him, permitted any person to dig or work mines, in his own land or inheritance, or with the permission of the proprietor, in that of any other individual . . .

"Philip II. acting under the authority of the council and chief accountants, and considering . . . that the above-mentioned law of John I., had not been enforced, and that there were various doubts and difficulties, not provided for by that or any other law; *vested the mines wheresoever situate, and whether in public or private ground*, in the crown; revoking the

former grants thereof, the parties interested under which were to receive a compensation, upon exhibiting their claims within the term of one year.

"The object of so vesting them, was not that the right of searching for them should be limited to the crown alone, but that it should be freely extended to all the people, generally in such manner that they should be at liberty, without any license from the crown or any other party, to try for mines in all places whatsoever, *whether the ground belonged to the crown or any other lord, to abbeys or municipal corporations, whether it were public or waste ground, or whether it were the inheritance or soil of a private person . . .*" (126-127.)

Gamboa's predecessor, Juan de Solorzano Periera, who was a member of the Council of the Indies and an equally outstanding jurist of his time, in his *Politica Indiana*,[13] Book VI, chapter 1, says:

" * * metals and the mines or the deposits from which they are taken, are held to be what is called regalian property (regalias), which is to say *property belonging to the kings* and supreme heads of the Provinces where they are found, as their own, and incorporated by law and custom into their patrimony and Royal Crown, *whether such metals are found in public places or in lands and possessions of individual persons;* and grants made by the rulers themselves because of the very general terms in which they are drawn, are of no avail and are ineffective to pr vately acquire or obtain the

[13] Published originally in 1629; 2d edition, Antwerp, 1702.

mines which are discovered in them, unless this is especially contained and expressed in such grant, as is provided and declared in many provisions of the common law and of the Kingdom . . ."

Such was the accepted status of sovereign ownership of the minerals when vast new sources of gold, silver, quicksilver, lead, and other deposits were discovered in Spain's American possessions. Even oil, tar, and pitch were known and being used for less valuable purposes. By the time Gamboa published his *Commentaries* in 1761, there was a great demand in Mexico for a new code of mining laws, and this demand resulted in a compilation by Mexican authorities of the mining ordinances of May 22, 1783, later promulgated by King Charles III, which remained in effect as the law of Mexico and Texas on this subject. This famous code contained the following provisions:

"OF THE ORIGINAL OWNERSHIP OF MINES: OF THE GRANTS TO INDIVIDUALS, AND THE DUTIES TO BE PAID BY THEM FOR THE SAME.

"Section I.

"The mines are the *property* of my Royal Crown, as well by their nature and origin, as by their re-union, declared by the fourth law of the thirteenth Title of the sixth Book of the new compilation [of Laws and Statutes].

"Section II.

"*Without separating them from my Royal patrimony*, I grant them to my subjects in property and possession, in such manner that

> they may sell, exchange (pass by will, either in the way of inheritance or legacy), or in any other manner, dispose of all their property in them, upon the terms on which they themselves possess it, and to persons legally capable of acquiring it." (Rockwell's *Spanish and Mexican Law*, 49.)

In Chapter 6, Section 22, it enumerated the minerals owned and made subject to exploration as

> ". . . not only the mines of gold and silver, but also those of precious stones, copper, lead, tin, quicksilver, antimony, calmine, bismuth, rock salt and other stoney matter (fossils), be they ores or semi-minerals, *bitumen, and liquids (juices) of the earth* . . ." (Rockwell's *Spanish and Mexican Law*, 54-55.)

The term "dominio radical" used in the caption of the Mining Ordinances of 1783 and in other Spanish mining laws in describing the property of the sovereign in mineral substances, is a technical expression which has been variously translated as "original ownership," "ultimate ownership," and "basic ownership." The term was employed by the authors of the Ordinances to signify that the concessionaire of a mining right thereunder, although he might transfer his rights, did not become vested with the ownership of the minerals in place which were still owned by the Crown. This is explained by Joaquín Velázquez de León, the drafter of the Ordinances, in his *Notas a las Nuevas Ordenanzas de Minas*, at pages 24-26.[14]

[14] See also the commentary of José Linares, "Legislación de Minas," published in *El Derecho* (Mexico, 1869), Vol. II, 457, *et seq.*

Dr. Walter Howe has recently published a book, *The Mining Guild of New Spain and Its Tribunal General, 1770-1821* (Harvard University Press 1949), in which he describes the sovereign rights under the "famous mining ordinances of 1783" as follows:

> "Under this code, the *ultimate ownership and title* to all mines remained with the crown, while the 'dominium utile,' or right to work mines, was conceded freely to individuals. This was a gradual development from earlier law and practice concerning the property in mine . . . .(2.)
>
> ". . .
>
> "*Ultimate ownership* of mineral deposits continued to rest with the crown, while the 'dominium utile' was conceded to individuals. This provision, carried over virtually without change into the Mining Code of the Mexican Republic, is of interest in giving precedent to the provision of Art. 27 of the Constitution of 1917 which declares the nation to be *ultimate owner* of all mineral deposits. (67.)
>
> ". . . The fact that they were drawn up by persons familiar with conditions in the New World was of the utmost importance, and was undoubtedly the reason why they proved so successful in practice. It has already been mentioned that they were extended to all of South America and the Philippines and had an influence on the mining laws of the United States." (77.)

After the Treaty of Guadalupe Hidalgo in 1848, most of the territory out of which was to be created

the States of California, Arizona, New Mexico, Colorado, Wyoming, Utah, and Nevada had previous Spanish or Mexican grants in which the minerals were owned by the Mexican Government and ceded to the United States under the Treaty. In his comprehensive treatise on *American Law Relating to Mines and Mineral Lands* (1897, 1903, 1914), Curtis H. Lindley found it necessary to devote considerabe space to the Mexican mineral law relating to these previous grants. Mr. Lindley says:

> "Ownership of mines under Mexican law.—Under the laws in force in Mexico at the date of the treaty of Guadalupe Hidalgo, mines *whether in public or private property*, belonged to the supreme government. (199-200.)
>
> "*No interest* in the minerals of gold and silver passed by a grant from the government of the land in which they were contained, without express words designating them. Such grant only passed an interest in the soil *distinct from that of the minerals* . . . .
>
> "In other words, *there was a severance of the title to the minerals from the title to the land.*
>
> "This was substantially the law of the ceding country at the date of the ratification and exchange of the treaty." (p. 200.)

Dr. Harlow S. Person, staff chief of the American experts whose research served as a basis of the international agreement between the United States

and Mexico settling the famous oil expropriation controversy, in his book *Mexican Oil* (1942) describes this ownership theory as:

> ". . . the fundamental Spanish-Mexican law to which attention has been directed—the fundamental doctrine that the sovereign, and his successors after revolution, the people, had *dominium directum* over the resources lying beneath the lands, and that the *surface owner was but conditional possessor of property never completely separated from the royal patrimony* . . . (20.)
>
> "The Constitution of 1917 restated in a fundamental charter the centuries-old Spanish-Mexican legal doctrine that the sovereign (the people) has *dominium directum* over all lands and what lies beneath them; . . . .(22.)
>
> "The Constitution of 1917, as has been indicated, restated fundamental Mexican law and declared that the *legal ownership* of petroleum and hydrocarbons—solid, liquid or gaseous—is vested in the nation; . . . ." (39-40.)

Throughout his book, Dr. Person speaks of the interest in the minerals as *dominium directum* (direct ownership) originally in the crown and then in the state in trust for the people. He makes it clear that oil was included.

Lares, an outstanding authority on the Spanish law, in his *Lessons in Administrative Law*, said:

> "Thus, according to this law of the rights of the crown [*regalia*], *the property in the mines*

*and the property in the surface were entirely distinct;* the property in the surface belonged to private ownership and gave rise to the right of indemnity if it was damaged; the other belonged to the *ownership* of the crown and was the object of privileges and concessions which became numerous, and frequently without indemnity to the owner of the surface . . . And this same principle was adopted by nearly all the nations, which in their laws and statutes declared as rights of the crown and as patrimony of the sovereigns the veins of precious metals *wherever they might be found, whether out in public lands, or whether in privately owned estates or lands. Thus it was in Germany, Spain and Portugal.*"[16] (85.)

Fernando Vega, a member of the Mexican Academy of Jurisprudence and Legislation, wrote:

". . . this property [coal and petroleum deposits] did not belong to the owner of the subsoil. With respect to this code of laws, the great juris-consult Vallarta, said: 'In Mexico mining property has always been separated from the surface property and never has the mineral vein passed with the acquisition of the land. (Votos Vol II p. 243). Señor Vallarta based his statement on the historical precedents of our country."[17]

Manuel Gonzales Ramírez, a leading Mexican attorney, further elaborating the principle of sover-

[16] Teodocio Lares, *Lecciones de Derecho Administrativo* (Mexico City, 1852).

[17] Fernando Vega, *Diario de Jurisprudencia* (Mexico City, 1905), Vol. VI, 78-79.

eign ownership of the minerals and the separation of the subsurface from the surface estate recently said:

> "In view of the economic importance which the products of the subsoil have manifested and the undeniable riches in this sphere which the subsoil of what was then New Spain constituted, the ancient Spanish Crown concerned itself with regulating the matter in a special way, so that three aspects, easy to perceive, predominate in the laws which were promulgated with respect to this: *the first concerns the fact that the Spanish laws took pains to separate the surface from the subsurface; the second aspect is that the basic ownership (dominio eminente) belonged to the King. . . .*"[18]

One of the greatest authorities on this subject in the United States was Justice Stephen J. Field of the Supreme Court of the United States. While a member of the Supreme Court of California, which dealt often with the subject, he wrote the opinion in the case of *Moore v. Smaw* and *Fremont v. Flower*, 17 Cal. 199 (1861), completely in accord with the Mexican and Spanish precedents above cited. He held that after 1848 the United States became entitled to the separate ownership in the minerals held by Mexico under an early Spanish grant of land in the California territory. The case is hereinafter referred to.

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[18] Manuel Gonzáles Ramírez, *El Petróleo Mexicano* (Mexico City, 1941) 152-154. See also José María Ots Capdequí, *Manual del Historia del Derecho Español en las Indias y del Derecho Propiamente Indiano* (Buenos Aires, 1945) 299.

*Texas Authorities*

There are several Texas cases directly in point on this question. They show that this State, under the Spanish Mineral Law, had both a separate and distinct ownership in the mineral estate under all lands within its borders and an easement to enter upon the lands to develop that which it owned in the subsoil. The first of these cases was *Cowan v. Hardeman*, 26 Tex. 217 (1862). There the Supreme Court of Texas, in separate opinions by Justices Moore and Wheeler, held that the State's reservation of minerals did not render void a patent to lands on which minerals were later discovered. Justice Moore said:

> "The main question for our decision in this case depends upon the construction that must be placed upon the proviso in the fourth section of the act for the relief of James Erwin and others, passed June 3, 1837, which reads as follows: 'Provided, that no lands granted by this government shall be located on salt springs, gold or silver mines, copper or lead, or other minerals, or any island of the republic.'
>
> "
>
> "The object and purpose of the legislature was simply to reserve to the republic the islands and the salt springs, gold and silver mines, copper and lead and other minerals, as corporeal hereditaments out of the public domain; and thus, while the mineral resources of the country that were then known to exist or that might afterwards be developed were thereby secured to the government, no embarrassment was placed in the way of the citizen in ac-

quiring the fee in the quantum of land to which his certificate or scrip entitled him. . . .

"Nor does the *reservation of its minerals and corporeal hereditaments* out of granted lands create any unusual or novel estate. It is a doctrine as old as the common law that all royal mines, that is to say, those of gold or silver, throughout the kingdom, *belonged* to the sovereign; and it is said, that though the king grant lands in which mines are, and all mines in them, yet royal mines will not pass by so general a description. Plow. 336. And we think it is evident that the legislature intended to do nothing more in this statute than to secure by an express reservation the same right to all minerals, when it granted land that was by the common law impliedly reserved to the king as to royal mines. Nor can it be urged that this construction militates against the express words of the law, which forbids the location of land, and that thereby we must understand that something more was intended to have been reserved than the *corporeal hereditament of the minerals; for it must be remembered that this character of hereditaments are real estate.* It is said in Rockwell's Spanish and Mexican Law, 580, 'that a *property* may be acquired in mines which will be *quite independent of the property in the lands* in which they are situated. In this condition, the minerals, of whatever character they may be, will, of course, still form parts of the land itself, and will constitute land in strictly legal acceptance."

Justice Wheeler, in his concurring opinion, said:

"In the case of Delesdenier v. The State, 7 Texas 102-3, the proviso of the act of January 3, 1837 (Hart. Dig. art. 1810), which has been

brought into discussion in this case, was considered by the court as the declaration of a general principle applicable to all grants by the state. *As such I think it was intended by the legislature; not as the adoption of a new principle in the law of the state, but as declaratory of the existing law.* As the object of the act was to discharge a debt contracted by the government, by the sale of scrip, which might be supposed to possess peculiar merits, and to operate, in so far as the holders of this scrip were concerned, a repeal of the laws creating reservations of islands, salt springs, etc., the proviso was introduced, out of abundant caution, to guard against the implication that such repeal was intended. *It was intended as declaratory of the existing law* in its application especially to the scrip for which they were providing.

"The legislation of the congress of the republic affords other evidences of the solicitude of the legislature to guard the interest of the state in her islands, salt springs and minerals. There is a similar instance of the insertion of a provision reserving the islands from private appropriation, in the joint resolution of the 10th of December, 1836 (Hart. Dig. art. 1779), authorizing the president to negotiate a loan, and providing for the issuing of land scrip for the purpose. And in the act of the 20th of January, 1840. (Hart. Dig. art. 127), 'to adopt the common law,' and 'repeal certain Mexican laws,' etc., the repealing section expressly excepts from its operation 'such laws as relate to the reservation of islands, and also of salt lakes, licks and salt springs, mines and minerals of every description;' manifesting a settled policy and purpose, on the part of the legislature, to protect the interest of the state in the enumerated objects, and to guard against their appropriation to the purposes of private speculation."

In the case of *State v. Parker*, 61 Tex. 265 (1884), the Supreme Court of Texas had before it the claim of the State to a "salt lake notoriously known as El Sal del Rey" in Hidalgo County. The large lake was located on soil theretofore patented by the State in 1847, and in the intervening time the Texas Constitution of 1866 had released to the owners of the soil all mines and mineral substances. The Court recognized that salt under the bed of the lake was a mineral and had been reserved by operation of law when the grant was made, but gave effect to the release of 1866. In this connection the Court said: "Theretofore in making grants of land the state had *reserved* the mines and mineral substances." It described the reserved right as including "salt springs, gold or silver mines, copper or lead, or other minerals," referring to *Cowan v. Hardeman, supra.*

In *Cox v. Robison*, 105 Tex. 426, 150 S. W. 1149 (1912), the Supreme Court of Texas construed the effect of the 1866 and 1876 constitutional releases of minerals to the then owners of the soil as applying retrospectively and not prospectively. They had no effect on the existing separate mineral ownership of the State in unsold lands and minerals.

Acting Attorney General of Texas Robert A. John wrote an exhaustive opinion for Governor Joseph D. Sayers on every phase of this subject on February 8, 1901. Most of his conclusions have been confirmed by subsequent court decisions. In speaking of the constitutional mineral releases of 1866 and 1876, he said:

> "These definitions show beyond question that the State in giving the release, meant only to quiet an existing claim or interest reserved to

the mines and minerals. It certainly did not intend to affect lands that were not at that time owned by private individuals, for the state was at that time the owner of all lands that had not been reduced to private ownership, and if the release was prospective, as well as retrospective, it operated as a release to the state, who was herself the owner of the mines and minerals, in all public lands. We therefore have the anomaly of the state granting a release to herself. . . . It is hardly possible to concede that they did not intend for the old Spanish law to remain in force, leaving it to the wisdom of future times, and to future legislation, the granting of a release to private owners of the minerals which the lands to be sold in the future, might contain. The policy of the Act intending to encourage the development of mines on lands then reduced to private ownership, stimulating the development of resources of that kind, is apparent.

"The release treated as retrospective was therefore wise, but it was certainly not intended to commit the state to the folly of granting to private owners the mines that might afterwards be discovered on lands then a part of the public domain. . . ."

In *Theisen v. Robison*, 117 Tex. 489, 8 S. W. 2d 646 (1928), the Supreme Court of Texas considered a mandamus requiring the Land Commissioner to issue relator a permit giving him the exclusive right to prospect for and develop the oil and gas upon and within certain University land in Crane County. The question was whether sale of a determinable mineral

estate in University lands was within the constitutional provision authorizing sale of *lands*. The Court said:

> "One of the first acts of the Republic of Texas (Paschal's Dig., Art. 4402, 5th ed.) was upheld by the Supreme Court after being construed as *reserving to the Republic certain minerals in certain lands or the grant of the remaining estates in such lands.* Cowan v. Hardeman, 26 Tex. 217.
>
> "The Constitution itself expressly recognized that the mineral estate was *capable of ownership and of sale separated from other estates in land*, when it provided that the state 'releases to the owner or owners of the soil all mines and minerals that may be on the same.' Sec. 7, Art. 14 Constitution." (650.)

A comprehensive book on this subject was written by Walace Hawkins in 1947. Taking its name from the great salt lake of Hidalgo County, "El Sal del Rey," it was published by the Texas State Historical Association. The following quotations are revelant here:

> "The Republic of Texas by reason of its successful revolution in 1836 might well have adopted the American legal system with respect to mines and minerals, but it did not follow this course. Neither did it formally re-enact the Spanish Mining Ordinance of 1783. Rather, by mere second-degree reference, it adopted this Spanish ordinance as the law of Texas. The ordinance was a Mexican law in force in Texas because Mexico, upon its independence, adopted

the ordinance as Mexican law. The Republic of Texas made it Texas law by its Constitution of 1836. . . ." (11-12.)

". . . The common law adoption in 1840 specifically excepted the common law pertaining to minerals. . . ." (12.)

"Upon entering the Union in 1846, the State of Texas did not, as it could have done, adopt the American or common law system with respect to minerals; but, as had the Republic, the state adopted the Mexican system of mineral reservation, which was nothing more than the Spanish Mining Ordinance of 1783. Moreover, this adoption was by reference and not by a re-enactment of the Spanish ordinance. The Confederate state constitution of 1861 followed the same course." (13.)

"The minerals saved to the state included gold, silver, precious stones, copper, lead, tin, quicksilver, rock salt, fossils, ores or semi-minerals, and *juices of the earth. While oil, gas, and sulphur were not mentioned by name, lawyers would find it difficult to maintain that Licenciado Velasquez's quaint list failed to include them.*" (14.)

"Within a few months of the one hundredth anniversary of this ordinance, Chief Justice Ignacio Luis Vallarta of the Supreme Court of Mexico, in the famous Milmo case, held that by the ordinance *minerals and surface ownership had been divorced and had become two distinct ownerships, each independent of the other. . . .*" (8.)

". . . long after minerals were relinquished to the owners of the surface by constitutional provision, the Supreme Court of the state finally decided the mineral question involved in the con-

test between the Spanish grant to San Salvador del Tule and the Texas patent and legislative act confirming the title to El Sal del Rey (1916). The court adhered to the Spanish system of *dual ownership and title to the surface and minerals*, that *title* to minerals did not pass with the ordinary grant or patent. The state, which had inherited *ownership* of El Sal del Rey from the Mexican government, retained its *title* thereto notwithstanding Governor J. Pinkney Henderson's patent to Lewis and notwithstanding the act of the legislature confirming the title granted by that patent. (27-28.)

"The Spanish and Mexican system was so indelibly a part of the government of Texas that the patent and the act of confirmation were required to be construed in accordance with the Spanish and Mexican law and not under the principles of common law as had been done in California. *In short, title to the minerals and the salt in El Sal del Rey had passed to the owner of the surface only by virtue of the constitutional mineral relinquishment of 1866. . . .*" (28.)

"*In respect to the remaining land, the public domain, in both annexed and ceded areas, the legislative branches of the governments were free to reserve minerals or make such other provisions as public policy and welfare demanded.*" (60.)

*Supreme Court of the United States*

In *United States v. Castillero*, 2 Black 17 (1862), the Supreme Court was called upon specifically to decide the nature of the title of a prospector who had discovered and denounced a mine in California prior

to the Mexican cession. If his interest was "land" within the meaning of an act of Congress providing for the settlement of "private land claims" to be recognized by the United States under the provisions of the Treaty of Guadalupe Hidalgo, then it was entitled to registration and validation. Otherwise, his exclusive right thereto would be lost. The case was exhaustively briefed and argued. The arguments of counsel and the majority and dissenting opinions of the Court cover 354 pages of the official reports.

The Court was unanimous in holding that under the Spanish Mining Ordinance of 1783, which remained in force in Mexico in 1848, the Crown and its successor, the Republic of Mexico, owned the minerals as a separate estate.

As to this, Mr. Justice Clifford, writing for the majority said:

> "*Property* in mines not discovered and registered according to law, *whether the mine was on public or private lands*, was *vested*, as has already appeared, exclusively in the Supreme Government, so that private persons could not acquire it or any interest in it in any other mode than that prescribed in the provisions of the mining ordinance. . . ." (169.))

and later

> "Mines under Mexican laws, as before explained, *whether situated in public or private lands*, *belongs* to the Supreme Government, and private persons can only acquire a title in one not previously discovered and made individual property according to law, by conforming substantially to the conditions ordained in the pro-

visions of the 4th article of the Mining Ordinance as herein previously recited. . . ." (190.)

We will not burden the Court with extensive quotations from this lengthy opinion. A more thoroughgoing examination of the sovereign right of Spain, Mexico, and Texas in undiscovered minerals wherever located could be found.

Without exception, every available authority on the subject concludes that the Spanish-Mexican-Texas mineral law vested in the sovereign a separate and distinct ownership of the mineral estate in all lands within the borders of the Republic.

*The Mineral Estate Includes Oil*

The authorities uniformly concede that oil was included within the Spanish Mining Ordinances of 1783 and its subsequent application in Mexico, Texas, and South American Countries.

As heretofore pointed out, the ordinances were drawn up in Mexico after a demand arose there for a code more applicable to the problems of mining in "New Spain." They were the first Spanish ordinances which specifically described liquid substances as within "all the mines and minerals reserved to the Crown." Article 22, Title 6, listed the minerals as including "bitumes or juices of the earth."

According to Mexican history, oil, pitch, and tar were known and used long prior to 1783. The following account is contained in *Mexico's Oil* (1940), a publication issued by the Mexican Government:

"The superficial evidences pointing to the existence of petroleum in Mexico, especially in the

Gulf Coast region, were so important that they could not have been ignored by the Indians. The black '*chapopoteras*,' pools of viscous liquid, so abundant in Tuxpam and Panuco; the old and oxidized asphalt deposits; the veins of an easily worked substance that cover the Papantla area; the strange and ill-smelling bubbling of the waters in some springs; the abundance of salt and sulphur springs; and the appearance of dark films on the surface of rivers and lagoons, could not fail to be observed by the inhabitants of the region.

"These viscous and, above all, treacherous pools, were even given a special name which we have corrupted, forming with its roots the hybrid word '*chapopoteros*.' '*Chapopote*' is the petroleum that seeps to the surface of the soil flowing naturally through the outcroppings of two strata of impermeable rocks. It is a black, ill-smelling substance of repulsive appearance. When burned, it gives off large clouds of thick heavy smoke of a penetrating odor. To our refined modern sense of smell, which is so peculiar, this odor is disagreeable; but to the Aztec noses it was only one odor more. Therefore, it is not surprising that they should have chosen '*chapopote*,' for ritual purposes. The word 'chapopote,' according to the Aztec scholar Cecilio Robelo, is a word composed of two elements: '*tzouctli*,' which means glue or gum, and '*popochtli*' meaning smoke or odor. Chapopote was burned as an incense before the Indian gods, while the priests officiated at their rites.

"During the three centuries of Spanish rule in Mexico, the use of petroleum was not more extensive. . . .

"A few years later, however, some of the Spaniards had already noted the existence of *chapopote*. In his narration, Andres de Tapia

says: 'In my towns, near the coast, in a certain part there exist fountains of molten tar which oozes out in the form of pitch only it has no smell and when it is heated it thickens and forms a substance which is good for calking and no shipworm gets through it as it is bitter.

"Clavijero, so truthful and exact, when referring to Lower California, called the California oil 'marine tar' which appears to indicate that it was used for calking purposes.

"The use of oil for medical purposes developed considerably during the period of Spanish rule.

. . .

"Near the time of the Independence, the Spanish Government seemed to have visualized what significance the oil might have in the future, since it enumerated it specially in the laws of the Indies (1783) among the bodies inalienable property in which was reserved to the Spanish Crown. The designation of the hydrocarbons is made in a charming phrase: 'bitumens or juices of the earth.' "[19]

José de Diego Fernández, a member of the Mexican Academy of Jurisprudence and Legislation, referring to coal and oil deposits, say "Both substances belonged to the crown at the time of the promulgation of the Mining Ordinances."[20] His colleague Miguel Mejía[21] concurs, saying:

"Therefore the rock coal mines and the petroleum mines were like all the others, the special

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[19] For additional historical material concerning early use of petroleum, see *Petroleum*, by William T. Brannt (Philadelphia, 1895) 2-6.

[20] José de Diego Fernández, *Diario de Jurisprudencia* (Mexico City, 1905), Vol. VI, 431.

[21] Miguel Mejía, *Diario de Jurisprudencia* (Mexico City, 1905) Vol. VI, 584.

subject of the mining ordinances and they were subject to the provisions thereof."

M. G. Villers[22] of Mexico writes:

> "In the third period, upon promulgation of the Mining Ordinance of 1783 especially for New Spain, we find a principle which may be considered as the origin of Petroleum Legislation. That is article 22 of Title VI of the Ordinance which says: 'Likewise I grant permission to discover, solicit, register and denounce in the manner provided, not only gold and silver mines, but also mines for precious stones, copper, lead, tin, quicksilver, antimony, zinc, bismuth, rock salt, and any other fossils of whatever kind, whether perfect metals or half-minerals, *bitumen or juices of the earth*, hereby according the necessary means for the accomplishment, beneficial use and working of them.' . . . Although the terminology bitumen and juices of the earth, was somewhat vague, *it shows a positive purpose to initiate a course of legislation concerning the matter, the same as applied to mining.*" (116-117.)

Maximilian was the first ruler of Mexico to use the word "petroleum" in describing the "juices of the earth." On July 6, 1865, he decreed:

> "Maximilian, Emperor of Mexico, considering that Article 22, Title 6 of the Mining Ordinances establishes no regulation for the working of substances other than precious metals,

[22] M. G. Villers, *El Articulo 27 de la Constitución Mexicana de* 1917 (Mexico City, 1926). See also Manuel Gonzáles Ramírez, *El petroleo Mexicano* (Mexico City, 1941) 161.

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and as it is now necessary to establish them because of the development taking place in these important branches, and having heard [the opinion of] our Councils of State and of our Ministers, We Decree:

"Art. 1. No person may exploit salt mines, fountains or wells and lakes of salt water, mines of coal, *bitumen*, *petroleum*, alum, kaolin, and precious stones without having obtained the prior express and formal concession thereto from the competent authorities and the approval of the Ministry of Development. . . ."[23]

Defendant has an abundance of evidence in the form of letters, newspaper articles, and testimony showing that oil was known and had valuable uses in the area in controversy long prior to 1845. Oil was specifically mentioned and considered by the Texas Constitutional Convention of 1866 as being included within the mines and minerals released to owners of the soil. *Cox v. Robison*, 105 Tex. 426, 150 S. W. 1149 (1912); *El Sal del Rey*, 58-59.

Hawkins in *El Sal del Rey*,[24] says:

"The minerals saved to the state included gold, silver, precious stones, copper, lead, tin, quicksilver, rock salt, fossils, ores or semi-minerals, *and juices of the earth. While oil, gas and sulphur were not mentioned by name, lawyers would find it difficult to maintain that Licenciado Velasquez's quaint list failed to include them.*"

[23] Secretaria de Industria, Comercio, y Trabajo, *Documentos Relacionados con la Legislación Petrolera Mexicana* (Mexico, Dirección de Talleres Gráficos de la Nación 1919) 31.

[24] Walace Hawkins, *El Sal del Rey* (Texas State Historical Association, 1947) 15.

On February 1, 1901, Acting Attorney General of Texas Robert A. John, after reviewing all the Spanish-Mexican-Texas mineral reservations, concluded:

> "In the reservation of minerals, as above discussed, includes in the general term 'mineral,' any substance which can be gotten from beneath the surface for purposes of profit, not limited to metallic substances; and, in other words, petroleum oil, coals and other deposits that come within that definition."

*The Separate Mineral Ownership Extends Beneath Rivers, Lagoons, and Other Territorial Waters*

As heretofore shown, the sovereign's separate mineral ownership extended to all minerals within the "realm," "borders," or "jurisdiction," whether in private, public, or common lands.

Rivers, ports, public roads, and the sea and its shores were said by the early Spanish law to be common or public. Gamboa says the crown's mineral ownership was in all lands "wheresoever situate" in the entire realm "whether in public or private ground." Solorzano says "where they are found," whether "in public places or in lands and possessions of individual persons." He specifically refers to "rivers and public waters."[25]

Lares also says "whenever they might be found, whether out in public lands, or whether privately owned estates or lands." Fonseca and Urrutia are in accord. They show that during colonial times there

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[25] Juan de Solorzano Pereira, *Politica Indiana* (1701), Book VI, Chap. XIII.

were a great number of salt lakes and salines throughout New Spain (Mexico) and that the principal ones were administered directly by the Crown, either through its officials or by means of special lease or concession arrangements with private individuals. Salt, as has been shown, was one of the minerals mentioned specifically in the Mining Ordinances of 1783 and previous laws. They also show that salt was taken from the lakes themselves, the basins and shores of the lakes, and the sea. They say:

> "The miners at Guanajuato, Balanes and Real de los Catorce consume the major part of the salt on the coasts; but in times of scarcity they go to Peñol Blanco. (Peñol Blanco was one of the principal salt lakes administered by the Crown, which is 35 leagues northeast of San Luis Potosi.) The miners at other places use only ground salt (i. e., salt which is scraped off of the basin of the lakes in times of drought) which is better than *salt from the sea* for working their metals, although they generally use *sea salt* when the prices are lower." (Vol. IV, 30.)

The same authors (writing in 1845) say that the salines and salt lakes in the province of Nuevo Santander, which embraced a large portion of the territory then within the boundary of Texas, were originally operated by means of leases and concessions to private individuals and that subsequently they were taken over and directly administered by

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[26] Fonseca y Urrutia, *Historia General de Hacienda* (Mexico, 1845 and subsequent years), Vol. IV, 6-140.

Crown officials. Also, according to Fonseca and Urrutia, the first gold mines to which the sovereign laid claim as his patrimony were mines located in the sands and gravel of the rivers or placers.

The writings of T. Esquivel Obregón in *Apuntes para la Historia del Derecho en México* also show that the mineral estate extended under rivers and water-covered areas. He says:

> "The unit of mining property according to the Ordinance of 1783 was one *square* or rectangle, each side being 200 Spanish varas. . . . *In placers and water-covered areas* [*rebosaderos*] and other irregular mineral-producing deposits, the location [*pertenencia*] was measured in the manner determined by the mining tribunal."[27]

Likewise José María Ots Capdequí says:[27a]

> "According to Solorzano and other authors he cited as authority, gold 'which is taken, found or worked *in the rivers or streams*' was regarded as regalian property.
>
> "
>
> "*The question is so clearly settled by this royal decree* [i. e., the decree of Feb. 5 1904] *that we do not consider any other authority necessary.*"

There seems to be no doubt that the sovereign mineral estate extended to things in the sea. According

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[27] (Mexico City, 1941) Tomo III, Neuva España, 225-226.

[27a] "El Derecho de Propiedad en las Indias" as published in *Anuario de Historia del Derecho Español*, Vol. II, p. 53 (Madrid, 1925).

to Dr. Juan Sala in his work, *Sala Mexicano* (1845), which was a standard legal text in Mexico,

> "The air and all that it includes, the sea with its shores and products, the term shore including all that portion which the sea covers at high tide, are common property by natural law, and they are unequivocally such to the Romans and the Spaniards. Notwithstanding this, and although individuals cannot take possession of them, the various uses made of the sea near the coasts make it susceptible of ownership as to that portion adjacent to the land. All nations fish and take therefrom shells, pearls, amber, etc. and this use of the sea coupled with the faculty they have to prohibit other nations from so doing, has converted the sea as to this portion thereof [i. e., the marginal sea] into property no different than the lands occupied by them. No one doubts that the taking of pearls in Bahren and Ceylon, are a species of property, says Vattel.
>
> ". . . .
>
> "In the same way as the littoral sea is the property of certain nations respectively, so are other things, which like the sea are common, which cannot become the property of a certain city or person. Such are the rivers, the ports and public roads which all the citizens make use of, and even foreigners . . ." (Vol. II, pp. 11-12.)

Pearls were an important item in the royal patrimony during Spanish colonial times. The prevailing view with respect to this matter is that of Solorzano. He says:

> "But this opinion [that pearls and precious stones are not regalian property] is generally

> rejected by the majority of the authorities [*Doctores*] who teach that under the term metals there is included all of these precious stones . . . and also that in reason that they should be incorporated into the crown, since they are equally difficult to find, and their value and importance to the public welfare is no less than that of metals. . . ."[28]

Elaborate laws were eventually placed into effect with respect to the taking of pearls from the sea, as is evidenced by Book IV, Title 25, laws 1 to 48 of the *Recopilación de Indias*. The effect of these laws was to establish pearls and pearl fisheries as the patrimony of the crown in the same manner as mines were so regarded, and to make provisions to insure the collection by Royal officials of the King's portion or "quinto."[29]

Capedequí also points out that ship-wrecked property was similarly regarded as belonging to the Crown, being additional evidence of the fact that the patrimony of the Spanish sovereigns was not confined to land areas but was coextensive with the entire realm, and reached out into the sea.[30]

In the Philippine Islands, which were also a part of the Spanish Colonial empire, the same laws are in force as prevailed throughout the Spanish Colonies in America. In the recent case of *W. H. Lawrence v. Garduño*, the Supreme Court of the Philippines de-

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[28] Solorzano, *Politica Indiana*, Bk. VI., Chap. IX.

[29] See also Fabian de Fonseca y Carlos de Urrutia, *Historia General de Hacienda* (Mexico, 1845), Vol. I, 20.

[30] José María Capdequí, "El Derecho de Propiedad en Indias," Tomo II, *Anuario de Historia del Derecho Español* (Madrid, 1925) 55, 57-58.

clared that under the old mining laws of the Philippines, inherited from Spain, and under its new laws which went into effect November 15, 1935,

> "Mineral deposits whether found in or under public or private lands or beneath rivers, lakes, lagoons, gulfs, bays, and seas within the maritime jurisdiction of the Philippines belong to the State and their disposition, exploitation, development or utilization shall be at the discretion of the State."

In Scotland, another civil law country, this rule of law was described in *Duchess of Sutherland v. Watson*, 6 Session Cases 199 (Court of Session of Scotland, 1868), where the opinion by Lord Neaves stated:

> "Coming to the question that we have here at issue, I think, in the first place, that the *solum* or *fundus* of the deep sea—that is, not only the part between high-water and low-water mark, but the sea within such a line as may be reasonably drawn in connection with the shores—belongs in property to the Crown, and does so as a patrimonial right. That it does so belong to the Crown, at least within narrow limits near the shore, such as are here in question, is clear; and that would be clearly seen if a question were raised as to any minerals which might extend under the sea, and which might be worked outwards from the shore to a point under the deep sea. I think that that right is a patrimonial one. It is not a right held by the Crown in trust for the public. There are rights held by the public that are burdens upon it so far. There is the public right of navigation; and there may or

may not be rights of fishing in the public—rights to catch fish that float in the public *fundus* or *solum*. These may be public rights; but the right of property in the *solum* of the sea I consider to be a clear patrimonial right of the Crown. And that right may be granted to one of the lieges subject always to those rights of navigation of which I have spoken, and it may be constituted by explicit infeftment, so as to make it a feudal estate." *Id.* at 213.

Another Scottish opinion in *Lord Advocate v. Clyde Navigation Trustees*, 19 Session Cases 174 (Court of Session of Scotland, 1891), stated:

> "Is the Crown's right in that strip of sea proprietary, like the Crown's right in the foreshore and in the land? Or is it only a protectorate for certain purposes, and particularly navigation and fishing?
>
> I am of the opinion that the former is the correct view. . . . In each case it is of course a right largely qualified by public uses. In each case it is therefore to a large extent extra *commercium;* but none the less it is, in my opinion, a proprietary right—a right which may be the subject of trespass, and which may be vindicated like other rights of property.
>
> Such I consider is the result of all the best authorities—Scotch, English, and foreign. . . . It has been affirmed on many occasions by high judicial authorities both in Scotland and England. It has also received practical effect in various judgments with respect, inter alia, to minerals under the sea, mussel-beds and oyster-beds, maritima incrementa, and flotsam and jetsam—(Smith v. Officers of State, 8 D. 722;—Gammell v. Lord Advocate, 3 Macq. 419; Duch-

ess of Sutherland v. Watson, 6 Macph. 199; Gann v. Whitstable Fishers, 11 C. B., N. S. 337, 13 C. B., N. S. 353, 11 H. L. 192; The Queen v. Duke of Cornwall, see L. R., 2 Exch. Div. 156; 21 and 22 Vict. c. 109)." *Id.* at 177-178.

All precedents on the subject indicate that the sovereign's separate mineral ownership was coextensive with the state's boundaries, including inland and coastal waters of the marginal belt. For instance, under the same Spanish law by which Texas claims its inland water and marginal belt minerals, Chile has for nearly 100 years produced, or leased for production, the undersea coal deposits under the Pacific off the coast of Lota. Today, the oldest mine has 50 miles of tunnels from the upland into the producing veins as far as four miles from shore beneath Chile's marginal belt along the Pacific Ocean. (See cross section sketch opposite page ____ of this brief.) Other subterranean coal mines under Chile's marginal belt include the Schwager and Lirquen mines. Under the same law, Peru owns and operates or leases a coal mine beneath its territorial sea in the Pacific, and Venezuela, Peru, Argentina, and Mexico have wells producing oil from beneath their marginal belts on the Atlantic, Pacific, and Gulf of Mexico, as well as from beneath other territorial waters. There are 2,000 wells in Lake Maracaibo, Venezuela, the fartherest well extending 11 miles out in the water.

In each instance the mineral ownership is held under the law inherited by Texas and Latin-American countries from Spain. It is described by Spanish and Mexican writers as a *dominium directum* and a *dominium strictum* which was vested in the sov-

ereign in place or while the minerals are in the ground, and does not depend in any way upon capture or reduction to physical possession. Its classification as *dominium* rather than *imperium* appears to be proper, because the use and disposition of the substance has no connection with the regulation and public uses of the waters or lands which overlie the mineral strata.

As shown in *Mines and Mining Laws of Latin America* (1892), Bull. No. 40 of the Bureau of the American Republics, the mining laws of the following Latin-American countries, which have their origin in the same Spanish Mineral Ordinance of 1783 and have the same nature of sovereign ownership, extend to minerals (including oil) under rivers, bays, the marginal belt of the adjacent sea, and other territorial waters: Argentina (9), Boliva (19), Brazil (37), British Guiana (49-58), Chili (63,66, 86), Columbia (92), Dutch Guiana (105, 112), Guatemala (131), Honduras (136), Mexico (187, 217), Nicaragua (232), Peru (258), Uruguay (276), and Venezuela (304). Mexico had a specific petroleum law realting to subsoil of the national lands, lagoons, etc. as early as 1901. *Mexican Oil* (1942) 36, *supra.*

In Texas the great salt lake, "El Sal del Rey," comprising about nine square miles, was the earliest reported case on sovereign ownership of minerals beneath waters. *State v. Parker, supra;* Hawkins, *El Sal Del Rey* (Texas Hist. Ass'n., 1947).

Upon a hearing of this case on the merits, the defendant will submit additional evidence in support of the foregoing facts and precedents, including maps

and technical data with respect thereto, and specifically showing their value, knowledge, and use by the Republic of Texas.

Texas has continuously asserted title to the minerals under its submerged lands. Since 1917 there have been laws authorizing mineral leases on river beds and channels. Since 1919, mineral leases have been authorized on all "salt water lakes, bays, inlets, marshes, reefs . . . and that portion of the Gulf of Mexico within the jurisdiction of Texas."[31] The maintenance of its separate mineral estate in these lands is best evidenced by the Legislature's wording of the present Act in 1939:

> "The mineral estate in river beds and channels and in all areas within tidewater limits, including islands, lakes, bays, and the bed of the sea, belonging to the State of Texas, are hereby set apart and dedicated to the permanent school fund."[32]

*The Separate Mineral Estate Did Not Pass to the United States*

As heretofore mentioned and hereinafter shown, the separate mineral ownership by the Republic of Texas was known to, and considered by, the United States Congress. The provision for cession of the mines and minerals was stricken from the draft of the Annexation Resolution. They were not ceded by

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[31] 19 *Gammel's Laws of Texas*, 51 S. B. 56, Chap. 19, 2nd called session, 36th Leg.

[32] Art 5421c-3, Sec. 2, Vernon's Annotated Texas Civil Statutes.

any other clause in the Resolution, and were intended to be reserved to the State of Texas, as evidenced by their omission from the cession, and by the reservation of "vacant and unappropriated lands lying within its limits." Although separate from the ownership of the soil, a general reservation of "lands" includes separate mineral estates. *United States v. Castillero*, 2 Black. 17.[33]

Under the mineral laws of Texas, the separate mineral estate did not pass except by specific grant. It did not pass by the transfer of national sovereignty to the United States. *United States v. Castillero*, supra; *Moore v. Smaw* and *Fremont v. Flower*, 17 Cal. 199 (1861). In the latter opinion by Mr. Justice Field, then a member of the Supreme Court of California, it was said,

> "*Such ownership stands in no different relation to the sovereignty of a State than that of any other property which is the subject of barter and sale.* Sovereignty is a term used to express the supreme political authority of an independent State, or nation. Whatever rights are essential to the existence of this authority are rights of sovereignty. Thus the right to declare war, to make treaties of peace, to levy taxes, to take private property for public uses, termed the right of eminent domain, are all rights of sovereignty, for they are rights essential to the existence of supreme political authority. . . . *The minerals do not differ from the great mass of property*, the *ownership* of which may be in the United States, or in individuals, without affecting in any respect the po-

[33] See also authorities argued under Point II D 1b (3) of the brief.

litical jurisdiction of the State. They may be acquired by the State, as any other property may be, but *when thus acquired she will hold them in the same manner that individual proprietors hold their property, and by the same right; by the right of ownership, and not by any right of sovereignty.*" (218-219.)

It therefore follows that regardless of who may have or not have technical ownership of the bed of the sea or the waters of the Gulf of Mexico within the original boundaries of Texas, the State's Public School Fund nevertheless owns the mineral estate therein and thereunder.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, ~~1949~~ ~~1950~~ 1951

No. ~~18~~ 8, Original

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

## DEFENDANT'S PETITION FOR REHEARING

PRICE DANIEL
*Attorney General of Texas*
J. CHRYS DOUGHERTY
JESSE P. LUTON, JR.
K. BERT WATSON
DOW HEARD
BEN H. RICE, III
WALTON S. ROBERTS
CLAUDE C. McMILLAN
FIDENCIO M. GUERRA
B. THOMAS McELROY
MARY K. WALL
*Assistant Attorneys General*

ROSCOE POUND
JOSEPH WALTER BINGHAM
MANLEY O. HUDSON
JAMES WM. MOORE
CHARLES CHENEY HYDE
*Of Counsel.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

No. 13, Original

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

## DEFENDANT'S PETITION FOR REHEARING

The State of Texas hereby petitions the Court for a rehearing of this cause and reconsideration of the majority opinion.

## PRELIMINARY STATEMENT

For 114 years Texas has had possession and enjoyed full rights of ownership of the 2,608,774 acres of submerged land within its original boundaries herein sued for by the United States.[1]

[1] Texas' boundaries, established in 1836 and in existence at the time of annexation, included the lands covered by the shallow waters of the Gulf three leagues from shore the same as the rivers, lakes and uplands within its territory. The area is described as "beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico *three leagues from land*, to the mouth of the Rio Grande . . . ." Texas Boundary Act, Dec. 19, 1836, 1 Gammel's Laws of Texas 1193; Texas' Brief, p. 58. (Emphasis supplied throughout.)

Although possibly the largest land suit in the history of this Court, this is not a case involving money and property alone. It is a public controversy of great magnitude between the national government and one of the United States involving an interpretation of the "proposals, guarantees, and conditions" of the international agreement under which that State, a former independent nation, entered the Union.

One of those "proposals, guarantees, and conditions" was that "said state, when admitted into the Union . . . shall also retain all the vacant and unappropriated lands *lying within its limits. . . .*"[2] For 103 years after this agreement, it was the consistent interpretation of officials of the United States[3] and

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[2] Sec. 2, Joint Resolution of the Congress of the United States, March 1, 1845. 5 Stat. 797. The "limits," embracing the submerged lands of the Gulf three leagues from shore, are not questioned by the Court. With reference to the Republic of Texas' ownership of this property, the majority opinion says:

> "We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held." 70 S. Ct. at 923.

[3] *Mr. Justice Tom Clark,* while Attorney General of the United States, testified that on the day he argued the *California* case in this Court, March 13, 1947, he handed to the press a written statement as to other States which contained these words as to Texas: ". . . Texas had been an independent nation, a republic, for ten years before joining the Union. As a republic it owned all of the lands within the boundaries, including the marginal sea commonly called tidelands. This area similar to that involved in the California case extended into the Gulf of Mexico and was under the sovereignty of Texas during the Republic and was retained by it under the provisions of the Act of Admission." (Joint Hearings Before the Committees on the Judiciary,

Texas that these lands and minerals were owned by Texas in accordance with the solemn contract entered into by the two sovereigns when Texas was still an independent nation. Such has been the history taught and believed in the Texas public schools. *Not until December 21, 1948, after the property had become more valuable through development by Texas and its lessees, did executive officials of the United States change their interpretation of the annexation agreement and seek to dispossess Texas of its ownership and possession of the property.*

For many years all of the property in controversy has been dedicated solely to the Public School Fund of Texas. The loss of its revenues at this late date would seriously damage the financial structure of the State's public school system. The importance of the case to Texas and to its people cannot be overstated.[4]

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on S. 1988 and Similar House Bills, 80th Cong., 2nd Sess. (1948) 689.)

*President Truman* said: "Texas is in a class by itself; it entered the Union by Treaty." (Speech at Austin, Texas, September 20, 1948.)

*Former Interior Secretary Harold L. Ickes* said: "Parenthetically, Texas may have the legal right to its tidelands because it came into the Union voluntarily and as an independent country." (Address over ABC Network, October 14, 1948.)

[4] The adverse federal claims have been the subject of resolutions and petitions to Congress by the Texas Legislature, the State School Land Board, the State Board of Education, the Texas State Teachers Association, the State Association of Parents and Teachers, the Texas State Bar, the Texas Departments of the American Legion and Veterans of Foreign Wars, and many other statewide and local civic organizations. A statewide newspaper poll on November 27, 1949, listed it as the problem considered by the people of Texas as the most important public issue facing the State.

It is equally important to the honor of the nation, which treats its international agreements "in the highest good faith" and whose Presidents said, while negotiating with the Republic of Texas for annexation:

> "We could not with honor take the lands without assuming the full payment of all encumbrances upon them."[5]

and

> "Of course, I would maintain the Texian title to the extent which she claims it to be . . . ."[6]

The great importance of the case to Texas and the century of possession and understanding of the annexation agreement, although not controlling, have a definite bearing upon the kind of consideration and hearing which should be accorded the State in this case.

In other original actions involving issues of this magnitude, this Court, sitting as the final arbiter of fact and law, has always permitted full development

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[5] President John Tyler, Annual Message to Congress, December 3, 1844, IV Richardson, *Messages and Papers of the Presidents* (1896) 334-52. *Texas was the only State required to assume payment of its previous public indebtedness.* Hershey, *Essentials of International Public Law* (1912) 136, note 13.

[6] President James K. Polk in letter dated June 15, 1845, to Andrew Donelson, United States Chargé d'Affaires, who was negotiating the annexation agreement with Texas. The Papers of James K. Polk, vol. 72, p. 6767, MS. Library of Congress.

of the evidence at a trial on the merits.[7] The practice in such cases was stated by Chief Justice White in *Virginia v. West Virginia*, 234 U.S. 117, 121 (1914), as follows:

> "As we have pointed out, in acting in this case from first to last *the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between states, involving grave questions of public law*, determinable by this Court under the exceptional grant of power conferred upon it by the Constitution, has been the guide by which every step and every conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should not now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of . . . *there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice, after the amplest opportunity to be heard, has in any degree entered into the disposition of the case.*"

In this case, despite repeated requests by Texas for an opportunity to present evidence confirming the correctness of the prior interpretation of the agree-

[7] The majority opinion in this case says: "The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." 70 S. Ct. at 922. Cf. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-257 (1948); *Eccles v. Peoples Bank of Lakewood, Cal.*, 333 U.S. 426, 434 (1948); *Iowa v. Illinois*, 151 U.S. 238, 242 (1894); *Rhode Island v. Massachusetts*, 14 Pet. 210, 257 (1840); *Kansas v. Colorado*, 185 U.S. 125, 144, 147 (1902).

ment by both the United States and Texas, the Court has departed from its previous practice by rendering summary judgment for the United States on the pleadings alone. The opportunity to present evidence has been denied. The intention of the parties in 1845 and their contemporary and subsequent construction of the agreement have been ignored. **Judgment has been rendered solely upon the Court's present interpretation of an "equal footing" clause which was not even contained in the agreement and which, even if implied, can be shown by the evidence to have had no such meaning or effect in the minds and intentions of the parties when they made the annexation agreement in 1845.** See Point I, *infra*, pp. 8-21.

No matter how desirable "equal footing" between the States as to ownership of marginal belt lands may now seem to appear to federal officials, the controlling question is what the parties deemed advisable and agreed to in 1845. Previously, in 1844, when Texas offered all of its lands and minerals to the United States in return for the assumption of its public debt of $10,000,000, the proposal was defeated in the United States Senate partially because the lands were said to be "worthless." The counter-proposal that Texas retain all "lands lying within its limits" and pay its own debts originated in the United States Congress, not in Texas. It was accepted by Texas, and Texas became the only State to assume its previous public debt. (See note 5, *supra.*) Also, by reason of the agreement, Texas is the only State west of the Mississippi which has received no federal land grants for public education.[8]

[8] See *Statistical Abstract of the United States* (1948 ed.), Table No. 188. As shown by this list, many of the States have received from the federal government for public school purposes far more than the 2,608,774 acres here involved.

These resulting "inequalities" cannot be offset except by allowing Texas to continue in its ownership of the lands as originally agreed.

Because of these errors, hereinafter detailed, Texas urges that a rehearing should be granted in order that it may at least be heard on the evidence before final disposition of this case. The very closeness of the 4-3 decision *before any hearing* of the evidence suggests the possibility of a different result *after a full hearing.*

It is also submitted that a case of such public import should not be decided finally by a minority of the full Court without full development of the evidence. Here, only four of the nine members of the Court have concurred. (Justices Jackson and Clark not participating.) Chief Justice Marshall, when the Court was composed of seven judges, said in *City of New York v. Miln*, 8 Pet. 120, 122 (1834):

> "The practice of this Court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four [of seven] judges concur in opinion, thus making the decision that of a majority of the whole court."

This practice would seem equally applicable to public questions of great import involving an international agreement, at least to the extent that a summary judgment should not stand when rendered by only four of the members of the Court and when the defendant State in good faith asserts that a full development of the evidence will reveal the intention of the parties, and hence the true meaning of the agreement, as being contrary to their interpretation.

There can be no "absolute necessity" of deciding the meaning of this international agreement by a minority of the whole Court without hearing the evidence.

## ARGUMENT

### I

**The majority opinion is based on an error of historical fact.**

**The Court erred in denying Texas the right to introduce evidence and in rendering judgment for plaintiff on the ground that a relinquishment of the property in question was effected by the "equal footing" provision of Section 3 of the annexation resolution, because Section 3 and "equal footing" were never submitted to nor accepted by the Republic of Texas and formed no part of the annexation agreement.**

The Court holds that an "equal footing" clause in Section 3 of the annexation proposal of March 1, 1845, effected a relinquishment to the United States of the 2,608,774 acres of land and minerals within Texas' original boundaries. **In so doing, the majority has based its opinion on a grievous error of fact and history.** Section 3, the only provision of the annexation resolution containing an "equal footing" clause, was an alternative method of annexation which was *never submitted* to Texas by the President of the United States and was *never considered or accepted as a part of the annexation agreement.*

Only Sections 1 and 2, which specifically provided for Texas' retention of "lands lying within its limits"[9] and which purposely contained no "equal foot-

[9] 5 Stat. 797.

ing" clause, were submitted and agreed upon between the United States and Texas.

Plaintiff's brief clearly recognizes that if the parties actually intended this retention to be as broad as it is written and, therefore, that Texas should retain the lands and minerals now in controversy within its original boundaries, there are no other terms in the agreement which would defeat this intention. Plaintiff argued that the property passed to the United States with the transfer of national sovereignty, but *only if the retention clause did not include the lands in question.*[10]

In spite of this frank position assumed by plaintiff, the Court has disposed of the case on a ground not suggested by plaintiff, and one which gives no consideration to the retention clause or to the intention of the contracting parties.

Quoting from the discarded Section 3, the majority opinion states that Texas was admitted to the Union in 1845 "on an equal footing with the existing states" under the "Joint Resolution approved March 1, 1845, 5 Stat. 797" (70 S. Ct. at 921), and that

> "We are of the view that the 'equal footing' clause of the Joint Resolution annexing Texas to the Union disposes of the present phase of this controversy." (70 S. Ct. at 922.)

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[10] All of plaintiff's arguments as to the irrelevance of Texas' former status as an independent nation and the effect of transfer of national sovereignty and "equal footing," Point II, B (Plaintiff's Brief, pp. 52-63), are conditioned upon the assumption that the retention clause is inapplicable to the lands in controversy. In note 28, p. 54, of plaintiff's brief, it is said:

> "We assume throughout Point II, B, that the 'vacant and unappropriated lands' clause is inapplicable for any or all of the reasons given in Point II, A."

In its final form this "Joint Resolution for Annexing Texas" (5 Stat. 797) embraced two entirely different bases and plans of annexation. Sections 1 and 2 provided:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new state, to be called the state of Texas, with a republican form of government, to be adopted by the people of said republic, by deputies in Convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the states of this Union.

"2. And be it further resolved, That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to-wit: *First*—said state to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments; and the constitution thereof, with the proper evidence of its adoption by the people of said republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action, on or before the first day of January, one thousand eight hundred and forty-six. *Second*—said state, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other

property and means pertaining to the public defence belonging to said republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind which may belong to or be due and owing said republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said republic of Texas; and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said state may direct; but in no event are said debts and liabilities to become a charge upon the government of the United States. . . ." (The remainder of Section 2 related to the division of Texas into four additional States, slavery, etc. Equal footing is not mentioned.)

Section 3 provided an alternative and basically different plan as follows:

*"3. And be it further resolved, That if the President of the United States shall in his judgment and discretion deem it most advisable, instead of proceeding to submit the foregoing resolution to the Republic of Texas, as an overture on the part of the United States for admission, to negotiate with that Republic; then, Be it resolved, that a state, to be formed out of the present Republic of Texas, with suitable extent and boundaries, and with two representatives in Congress, until the next apportionment of representation, shall be admitted into the Union, by virtue of this act, on an equal footing with the existing states, as soon as the terms and conditions of such admission, and the cession of the remaining Texan territory to the United*

*States shall be agreed upon by the governments of Texas and the United States: And that the sum of one hundred thousand dollars be, and the same is hereby, appropriated to defray the expenses of missions and negotiations, to agree upon the terms of said admission and cession, either by treaty to be submitted to the Senate, or by articles to be submitted to the two Houses of Congress, as the President may direct.*" (Italics supplied to distinguish discarded section. The underlined words are those quoted and relied upon by the majority opinion.)

Only Sections 1 and 2 of this resolution, which did not contain the "equal footing" clause but contained specific terms for the admission of Texas, were presented to Texas "as the basis of its admission."[11] The alternative method contained in Section 3 was deliberately discarded by both Presidents Tyler and Polk.[12]

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[11] 1 Senate Docs., 29th Cong., 1st sess., No. 1, pp. 32, 35, 48-49, 54, 85, 98; 1 House Docs., 29th Cong., 1st sess., No. 2, pp. 125-126, 127-128, 34-35, 41-42, 76, 86.

[12] Hunter Miller, in *Treaties and Other International Acts of the United States*, published by the Department of State (1934), describes the Presidential actions as follows:

"The term of President Tyler was about to expire; but he decided to act at once, and to act under sections 1 and 2 of the joint resolution (see Tyler, Letters and Times of the Tylers, II, 364-65); and the following instructions were sent to Andrew Jackson Donelson, Chargé d'Affaires to Texas . . . under date of March 3, 1845:

" 'I herewith transmit to you a copy of the Joint Resolutions adopted by Congress for the annexation of Texas to the United States.

" 'You will perceive that they consist of two distinct parts; the one embraced in the first and second sections, being the original Resolution as it passed the House of Representatives; the other, included in

This fact was expressly recognized in the brief of the United States[13] and is made clear in the acts of

the third and last, being the amendment made by the Senate and subsequently adopted by the House. The former contains certain specific propositions for the admission of Texas into our Union; the latter gives a discretionary power to the President, if he should deem it advisable, to enter into negotiations with the Republic, as prescribed in the section itself, instead of submitting to its acceptance or rejection the proposals contained in the former.

"'The President has deliberately considered the subject, and is of opinion that it would not be advisable to enter into the negotiations authorized by the amendment of the Senate, and you are accordingly instructed to present to the government of Texas as the basis of its admission, the proposals contained in the Resolution as it came from the House of Representatives.'" (Vol. 4, pp. 706-07.)

"President Polk adopted the decision of his predecessor; the instructions to Donelson signed by Secretary of State Buchanan on March 10, 1845 . . . differed somewhat in their reasoning from those of March 3, 1845, but were to the same effect:

"'You will have received, ere this can reach you, the despatch of Mr. Calhoun, the late Secretary of State, of the third instant, instructing you "to present to the government of Texas, as the basis of its admission, the proposals contained in the Resolution as it came from the House of Representatives." President Tyler having thus determined to adopt the two first of the series of Resolutions instead of the alternative presented by the third, it became the duty of the President to devote his attention to this important question at as early a moment as possible. This has been done, and his deliberations have resulted in a clear and firm conviction that it would be inexpedient to reverse the decision of his predecessor.'" (Vol. 4, p. 708.)

[13] At p. 9, note 4, it was said: "The third section of the Joint Resolution gave the President the option to negotiate with the Republic of Texas for annexation on different terms. The President did not take advantage of that option, but submitted to the Republic the specific terms contained in the first two sections of the Joint Resolution."

acceptance by Texas and the subsequent action of the United States.

In the Joint Resolution of the Congress of Texas accepting the annexation proposal submitted by Presidents Tyler and Polk, June 23, 1845, 2 Gammel's Laws of Texas 1225, it was provided in the preamble:

> "Whereas, the Government of the United States hath proposed the following *terms, guarantees, and conditions*, on which the people and Territory of the Republic of Texas may be erected into a new State, to be called the State of Texas, and admitted as one of the States of the American Union, to-wit:
>
> "[*Quoted here was all of the Joint Resolution of the Congress of the United States of March 1, 1845, except Section 3.*]"

It was resolved that

> "... said consent is given on the terms, guarantees, and conditions set forth in the Preamble to this Joint Resolution."

There was no "equal footing" provision in this resolution.

The Ordinance of the Convention of Texas, July 4, 1845, 2 Gammel's Laws of Texas 1228, giving consent of the people of Texas to the annexation agreement, was in part as follows:

> ". . . *whereas the President of the United States has submitted to Texas the first and second sections of the said resolution* [of March 1, 1845], *as the basis upon which Texas may be admitted* as one of the States of the said Union;

and whereas the existing government of the Republic of Texas has assented to the proposals thus made, the terms and conditions of which are as follows,

"[*Quoted here was all of the Joint Resolution of the Congress of the United States of March 1, 1845, except Section 3.*]

"Now, in order to manifest the assent of the people of this Republic as required in the above recited portions of the said resolutions; We the deputies of the people of Texas in convention assembled, in their name and by their authority, do ordain and declare, that *we assent to, and accept the proposals, conditions and guarantees contained in the first and second sections of the resolution of the Congress of the United States aforesaid.*"

There was no "equal footing" provision in this ordinance nor in the constitution drafted by the same convention "in accordance with the provisions of the Joint Resolution for annexing Texas to the United States." Instead, this constitution specifically provided:

"The rights of property . . . which have been acquired under the Constitution and laws of the Republic of Texas, . . . shall remain precisely in the situation which they were before the adoption of this Constitution." (Article VII, Section 20, Constitution of Texas, 1845.)

This constitution was approved by the Congress of the United States on December 29, 1845 (9 Stat.

108), as being "in conformity to the provisions of said Joint Resolution [March 1, 1845]," which were by the same act recognized to be "the proposals, conditions, and guarantees contained in said first and second sections of said resolution."

It is clear, therefore, that the majority opinion is erroneously based on a clause which was not included in, but was purposely omitted from, the annexation agreement between the United States and Texas. No "equal footing" provision, whether with or without the meaning now applied to the term by the Court, was presented to or agreed upon by Texas at any stage of the annexation procedure or as any part of the "terms, guarantees, and conditions" of its agreement with the United States.

The only mention of "equal footing" in the entire procedure was a unilateral inclusion of the term by the United States Congress in the final act of admission on December 29, 1845. (9 Stat. 108.) As said by President Polk, and as the evidence will clearly show, this act was a mere formality.[14] It was not

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[14] In a letter to General Sam Houston, dated June 6, 1845, President Polk wrote:

> "If she [Texas] accepts unconditionally, the great measure of the re-union of the two countries will be placed beyond danger and *may be regarded as consummated, for the next session of Congress as a matter of course* will redeem the National faith and admit her into our Union."

On June 15, 1845, President Polk wrote Andrew Donelson, United States Chargé d'Affaires, who was negotiating the agreement:

> ". . . the conventions of Texas should on the day they meet pass a general resolution accepting our terms of annexation. The moment they do this I shall regard Texas as a part of our Union . . . ."

submitted to the Congress or to the people of Texas, and it was not intended to and could not alter the terms and conditions of annexation theretofore specifically agreed upon by joint action of the Congress of the United States, the Congress of Texas, and the people of Texas in convention assembled.

Indeed, the Court has attached no significance to this clause in the formal admission resolution of December 29, 1845. It was not even referred to in the majority opinion. The Court, of course, perceived that under the plan that was actually submitted to Texas, consummation of the agreement was not made contingent upon future consent of the Congress of the United States. After declaring, as it did, in the Joint Resolution approved December 29, 1845, that Texas had fully satisfied the terms and conditions entitling her to be admitted as a State pursuant to the Joint Resolution approved March 1, 1845, Congress was powerless to change or add to the agreement by this unilaterial *post factum*.

Nor did the Congress of the United States purport to change the agreement by the resolution of December 29, 1845. The preamble to the formal resolution of December 29, 1845, recites that the "consent of Congress was given upon certain conditions specified in the first and second sections of said Joint Resolution [of March 1, 1845]", and that "the people of the said Republic of Texas . . . assented to and accepted the proposals, conditions, and guarantees contained in said first and second sections of said resolution. . . ." Thus, it was recognized by the resolution itself that by this process of offer and acceptance a binding agreement had

been previously concluded, and the formal admission was in accordance with that agreement.

To say that this general "equal footing" clause inserted by the United States Congress in the formal act of admission was intended to nullify the specific agreement already made with respect to all lands lying within its limits would thus be contrary to the express intention of the parties and also would violate established rules of construction.[15]

The Court has not said whether, aside from "equal footing," the Court agrees or disagrees with defendant's interpretation of the annexation agreement. But the Court's opinion does say, in effect, that if "equal footing" were absent from the Joint Resolution approved March 1, 1845, "introduction of evidence and a full hearing would be essential."

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[15] Established principles in the interpretation of treaties and other international agreements are:

(1) "the intention of the parties is to be determined by a consideration of the whole instrument, not by viewing the stipulations separately" (Crandall, *Treaties, Their Making and Enforcement* (2d ed. 1916) 317; *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921); *Ross v. McIntyre*, 140 U.S. 453, 475 (1891); *United States v. Texas*, 162 U.S. 1, 36 (1896).

(2) in case of a conflict between different provisions of the same treaty or agreement, that which is specifically stated prevails over the more general statement (Hershey, *Essentials of International Public Law* (1919) 315-17; Woolsey, *International Law* (6th ed. 1892) 173-74);

(3) "no treaty should be construed as intended to divest rights of property . . . unless the purpose so to do be shown in the treaty with such certainty as to put it beyond reasonable question" (*United States v. Minnesota*, 270 U.S. 181, 209 (1926); Glenn, *International Law* (1895) 144-46; Taylor, *International Public Law* (1901) 397, § 385; and

(4) treaties are regarded by this Court as international compacts to be faithfully observed by the United States and are to be construed "in the highest good faith in so far as the other party is concerned" (Lenoir, "Treaties and the Supreme Court," 1 U. of Chi. L. Rev. 602, 617 (1934); Crandall, *Treaties, Their Making and Enforcement* 401). See also pp. 31-34, *infra*.

Since, from the foregoing, it is beyond dispute that "equal footing" was not mentioned in the negotiations and agreement concluded with the Republic of Texas in accordance with Sections 1 and 2 of the Joint Resolution approved March 1, 1845, defendant respectfully but earnestly insists that rehearing should be granted and "full development of the facts" should be allowed.

Even if this "equal footing" clause were a part of the agreement, the meaning or effect of the term should be determined in the light of what the parties at that time understood as the meaning of the term. *Strother v. Lucas*, 12 Pet. 410, 438, 446 (1838); *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912); *Ross v. McIntyre*, 140 U.S. 453, 475 (1891); Fenwick, *International Law* (3rd ed. 1948) 444; Miller, "Preparatory Work in the Interpretation of Treaties," 17 Iowa L. Rev. 206, 213 (1931).

The State has an abundance of evidence from Congressional Records, correspondence, and speeches, which conclusively shows that in 1845 the members of both the United States and Texas Congresses *then believed* that new States would own all lands beneath navigable waters within their boundaries, inland and coastal, even without express grant or retention, under the then existing concept of State sovereignty and "equal footing." It should be remembered that several State court decisions and two Supreme Court decisions had previously stated Congress' 1845 belief as the law. As early as 1842 in *Martin v. Waddell*, 16 Pet. 367, 410, this Court said:

> ". . . when the revolution took place, the people of each State became themselves sovereign;

> and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

The rule had been announced again by the Supreme Court in 1845 in the case of *Pollard v. Hagan*, 3 How. 212, 230, as follows:

> "First. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. Second. The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States."

The understanding and belief as to the law on this subject in 1845[18a] is forcibly shown by the following language of this Court in the *California* case:

> "As previously stated this Court has followed and reasserted the *basic doctrine of the Pollard case* many times. And in doing so it has used language strong enough to indicate that the Court *then believed that States* not only owned tidelands and soil under navigable inland waters, but also *owned soils under all navigable*

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[18a] The *Pollard* case was decided by this Court on February 18, 1845, while the debate on annexation was in progress in the Congress.

*waters within their territorial jurisdiction, whether inland or not.*" (332 U. S. at 36.)

The majority opinion says "there is no need to take evidence to establish that meaning of 'equal footing' " which is understood by the Court today. But the Court's understanding of the current meaning of "equal footing" is not the criterion. The question is the understanding and intention of the parties as to the meaning of that term in 1845. If given the opportunity, Texas will present evidence which will show that the minds of the contracting parties never met on the meaning or effect of "equal footing" as those words are now interpreted and applied by the Court to the lands and minerals in controversy. On the contrary, it will show that their understanding, meaning, and intention were in complete harmony with the specific retention of these lands and minerals by Texas.

Even if viewed in the light most favorable to plaintiff, this case presents a dispute as to the meaning of the documents and the intention of the contracting parties, the answer to which is to be found in diplomatic correspondence, contemporary and subsequent construction, usage, international law, and the like. In such cases the majority opinion clearly states that "introduction of evidence and a full hearing would be essential." (70 S. Ct. at 922.)

The Court has erred in rendering summary judgment for the plaintiff and thereby denying Texas a trial on the merits. Rehearing should be granted in order that introduction of evidence and a full hearing may be had.

## II

**The Court erred in ignoring and refusing to hear evidence on that part of the annexation agreement which provided that Texas was to retain "all vacant and unappropriated lands lying within its limits."**

As pointed out under the preceding point, the United States recognizes in its brief that if the property in question was included within, or intended to be included within, the specific clause that Texas retain all unsold lands "lying within its limits," it is not entitled to judgment.

In its brief, plaintiff devoted 30 pages of its 61 pages of argument to an attempt to show that this property was not intended to be included within the retention clause.[16] The next 11 pages were devoted to an argument that the transfer of this property is evidenced by the transfer of national sovereignty and by alleged "equal footing."[17] *However, the conclusion sought by this entire argument was frankly admitted to be proper only if the Court finds that the retention clause was inapplicable to this property.*[18] The remainder of plaintiff's argument (pp. 63-80) deals with prescription (Point II, C), a "résumé" of previous arguments (Point II, D), and that portion of the continental shelf outside of the original boundaries of Texas (Point III).

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[16] See Plaintiff's Brief in Support of Motion for Judgment, Point II, A, pp. 22-52.

[17] Point II, B, *id.* at pp. 52-63.

[18] In this connection plaintiff said: "We assume, throughout Point II, B, that the 'vacant and unappropriated lands' clause is inapplicable for any or all of the reasons given in Point II, A, *supra*." (Note 28, *id.* at p. 54.)

Nowhere in its brief does plaintiff contend that any provision of the Constitution or the annexation agreement prevents State ownership of these lands and minerals if in fact the parties so intended by agreeing to Texas' retention of the unsold "lands lying within its limits."[19]

This Court, in the *California* case, recognized that ownership of this type of property is not a necessary incident of national sovereignty or essential to the exercise of federal constitutional powers over the area when it said that the power of Congress to deal with such property "is without limitation." The Court added, "Thus neither the courts nor the executive agencies could proceed contrary to an Act of Congress in this congressional area of national power."[20]

Implicit in the powers of the United States Congress to convey such lands and minerals to other

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[19] In the Government's brief in *United States v. California*, 332 U.S. 19 (1947), it was said:

> "We do not argue that the effective exercise of the foregoing powers (national defense, commerce, international relations) granted to the Federal Government by the Constitution would be impossible without ownership of the marginal sea." (p. 89.)

[20] *United States v. California*, 332 U.S. 19, 27. Again, after stating that valuable improvements made in good faith under State titles are not ground for a different judgment, the Court said: "But beyond all this we cannot and do not assume that Congress, which has constitutional control over Government property, will execute its powers in such way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission." *Id.* at 40.

States[21] and to good faith claimants,[22] and to admit new States,[23] is the power to admit Texas to the Union under an agreement that Texas retain the lands and minerals in the first instance.

Therefore, the nature of this property, its subordination to paramount political powers, "equal footing," and transfer of national sovereignty are wholly irrelevant if the parties did in fact specifically agree that Texas retain the lands and minerals within its Gulfward limits three leagues from shore.

This being true, the meaning and effect of the retention clause is, as recognized by plaintiff's brief, a controlling issue in this case. The Court has erred in failing to consider the clause, its meaning, and the intention of the parties agreeing thereto.

In its amended answer and brief, Texas urged as a matter of law, and also as a matter of fact based on the intention of the parties, that the submerged lands within its original boundaries were included within the retention by Texas of all "lands lying within its limits."[24]

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[21] Solicitor General Perlman, in answer to a question by Mr. Justice Reed during the argument on the Motion for Leave to File the Complaint herein, said that if the United States owns the property, it could convey it to the States. His words:

> "Oh, yes, Congress could give whatever title it has, whatever rights it has, to the states." Argument, *United States v. Texas*, March 28, 1949, Reporter's Transcript, p. 6.

[22] *United States v. California*, 332 U.S. 19, 40; see note 20, *supra*.

[23] Constitution of the United States, Art. IV, Sec. 3.

[24] First Amended Answer of the State of Texas, p. 15, wherein it was alleged:

> "By these acts on the part of the United States and the Republic of Texas, when construed, as they must be, in the light of the intention of the contracting parties, there was a binding agreement between the

As a matter of law, Texas made these arguments which have not been disposed of by the Court:

1. Ownership of the lands and minerals within its original Gulfward limits,[25] being a proprietary right under the domestic law of the Republic of Texas, remained in the State of Texas, because this ownership was not expressly ceded to the United States.[26] See *Attorney General of Canada v. Attorney General of Ontario*, [1898] A. C. 700, 709-10, in which was presented the question of whether proprietary rights of the Canadian provinces in lands beneath territorial waters passed with national political powers to the Dominion of Canada. The Court said:

> "Whatever proprietary rights were at the time of the passing of that Act possessed by the provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada."

Vattel says that in interpreting agreements of this nature,

> "Whatever tends to change the present state of things is also to be ranked in the class of odious things: for the proprietor cannot be deprived of his right, except so far, precisely, as

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two independent sovereigns that upon annexation Texas would not cede to the United States any, but that the newly created State would retain all, of the lands, minerals, and other things lying beneath that part of the Gulf of Mexico within the original boundaries of the Republic. . . ." See also Texas' Brief in Opposition to Motion for Judgment, pp. 136-192.

[25] These limits, "three leagues" from shore, are not questioned by the Court. See notes 1 and 2, *supra*.

[26] Texas' Brief, pp. 143-152.

he relinquishes it on his part; and in case of doubt, the presumption is in favour of the possessor."[27]

2. The marginal belt lands and minerals within Texas' original boundaries were included within and retained by the specific clause agreed upon by the United States and Texas that "said state, when admitted into the Union . . . shall also retain all the vacant and unappropriated lands *lying within its limits*. . . ." (See argument and authorities submitted in Texas' Brief, pp. 153-62.)

3. The title to mineral lands, all of which were owned in separate estate by the Republic throughout the limits of its territory and held in trust for the people,[28] did not pass with national sovereignty but remained in the State. *United States v. Castillero*, 2 Black 17 (1862); *Moore v. Smaw* and *Fremont v. Flower*, 17 Cal. 199 (1861). In the latter opinion by Mr. Justice Field, then Chief Justice of the Supreme Court of California, it was said:

> "*Such ownership stands in no different relation to the sovereignty of a State than that of any other property which is the subject of barter and sale.* Sovereignty is a term used to express the supreme political authority of an independent State, or nation. Whatever rights are essential to the existence of this authority are rights of sovereignty. Thus the right to declare war, to make treaties of peace, to levy taxes, to take private property for public uses, termed

[27] Vattel, *The Law of Nations* (Chitty's 1st ed. 1834) 265.

[28] Texas' Brief, pp. 113-24; Appendix, pp. 68-107.

> the right of eminent domain, are all rights of sovereignty, for they are rights essential to the existence of supreme political authority. . . . *The minerals do not differ from the great mass of property*, the *ownership* of which may be in the United States, or in individuals, without affecting in any respect the political jurisdiction of the State. They may be acquired by the State, as any other property may be, but *when thus acquired she will hold them in the same manner that individual proprietors hold their property, and by the same right; by the right of ownership, and not by any right of sovereignty.*" (pp. 218-19.)

Under the mineral laws of the Republic of Texas, the separate mineral estate did not pass except by express grant. This special and separate mineral ownership by the Republic of Texas was known to and considered by the United States Congress. A provision for cession of the mines and minerals to the United States was stricken from the draft of the annexation resolution.[29] They were intended to be retained by the State of Texas, as evidenced by their omission from the cession and by the retention of "all vacant and unappropriated lands lying within its limits." Although separate from the ownership of the soil, a general retention of "lands" includes separate mineral estates. *United States v. Castillero*, 2 Black 17 (1862).

4. The marginal belt lands and minerals lying within the boundaries of the Republic of Texas were rights of property held by the Republic in trust for

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[29] See specific congressional action outlined in Texas' Brief, pp. 151-152.

the people[29a] and were therefore included within the following provision of the Constitution of the new State adopted as part of the annexation procedure:

> "The rights of property . . . which have been acquired under the Constitution and laws of the Republic of Texas . . . shall remain precisely in the situation which they were before the adoption of this Constitution."[30]

This Constitution was laid before the United States Congress and was approved by that body in the final Act of Admission as being "in conformity to the provisions" of the annexation resolution. 9 Stat. 108.

In view of the foregoing matters of law, the Court erred in granting plaintiff's motion for judgment with respect to the lands and minerals lying within the limits of the original Gulfward boundaries of the Republic of Texas three leagues from shore.

If, after considering these matters of law, there remains any doubt as to the meaning of the documents and the intention of the parties with reference to the retention of these lands or minerals by Texas, the Court should hear the evidence bearing on this meaning and intention before resolving the doubt.

The evidence in Texas' possession will show that the Republic of Texas owned, used, and had knowledge of the value of the 2,608,774 acres of submerged lands and minerals within its three-league

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[29a] *City of Galveston v. Menard*, 23 Tex. 349 (1859).

[30] Art. VII, Sec. 20, Constitution of 1845; 2 Gammel's Laws of Texas 1293-94.

Gulfward boundary;[31] that the representatives of the United States and Texas intended the retention by Texas of unsold "lands lying within its limits" to be as broad as it appears and to include all lands within the Gulfward boundary of the Republic, not simply those above low-water mark as plaintiff contends; that the parties intended and provided no present cession of property by the annexation agreement, it being agreed that *only after the State was admitted into the Union was any property to be ceded*, and then only the specifically listed property *then pertaining* to the public defense; that after admission to the Union, all property of this nature was inventoried by officials of both the United States and Texas and was expressly conveyed by the State of Texas and accepted by the United States as full compliance with the agreement; that no other property was asked for or intended to be transferred; that none of the inventories or conveyances included the property in controversy; that during 103 years of subsequent construction both the United States and Texas have recognized that it was intended for the State of Texas to retain the ownership of the lands and minerals within its three-league Gulfward boundary; and that customs, usages, and practices of nations in 1845 fully support the above meaning and effect of the international agreement between Texas and the United States. (See summary of available evi-

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[31] The majority opinion does not question this. In this connection it says: "We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held." 70 S. Ct. at 923.

dence of international practice in Joint Memorandum appended hereto at p. 54.)

For over two years, counsel for Texas, at great expense to the State, have been gathering letters, diplomatic correspondence, newspaper files, maps, and other documents from the National Archives, Texas Archives, and other official and private sources, relevant to the above meaning and interpretation. Texas has an abundance of evidence and testimony bearing upon the intention of the parties and their contemporary and subsequent interpretation that the State retained all proprietary rights to the lands and minerals in controversy. These subsequent interpretations include letters and opinions of the Attorney General of the United States, the Department of State, and the Secretary of the Interior, as well as of the parties who actually negotiated the agreement on behalf of the two nations. Defendant is prepared to prove that the parties who negotiated this agreement in 1845 believed at that time that these and all other submerged lands within State boundaries were owned by the respective States even without being mentioned in a retention or granting clause. Letters, speeches, and other documents will show that no one at the time made any contention that these lands would not belong to the new State. The understanding of the parties at that time must be given controlling effect as to whether they meant what they said, or had something else in mind, when they agreed that Texas should retain all of the unsold lands "lying within its limits."

The Court recognizes that.

> "If there were a dispute as to the meaning of documents and the answer was to be found in the diplomatic correspondence, contemporary construction, usage, international law and the like, introduction of evidence and a full hearing would be essential." (70 S. Ct. at 922.)

That there is a dispute as to the meaning of documents seems fairly obvious from the pleadings and briefs of plaintiff and defendant, as well as from the fact that the Court itself divided 4-3 on the question of what was intended by the annexation agreement.

"At least," says Mr. Justice Reed, joined by Mr. Justice Minton, "we should permit evidence of its meaning." 70 S. Ct. at 926. Mr. Justice Frankfurter says that

> " . . . the submerged lands now in controversy were part of the domain of Texas when she was on her own. The Court now decides that when Texas entered the Union she lost what she had and the United States acquired it. How that shift came to pass remains for me a puzzle." 70 S. Ct. at 927.

If there is any doubt as to the meaning of the disputed documents in question, the answer should be ascertained from "the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter, and to their own practical construction of it." *Factor v. Laubenheimer*, 290 U.S.

276, 294-95 (1933).[22] It has been said in this connection that

> ". . . in order to ascertain the clear intent of the parties to a legal writing, whether it be a will, a contract, a statute, or an international agreement, recourse should be had to all extrinsic evidence which may aid the interpreter. It is not enough even that the text should be 'intelligible,' that its meaning should seem 'sufficiently clear.' The interpreter is bound to seek to discover the meaning of the terms used as understood by the negotiators and contracting parties. Such meaning is obviously not 'sufficiently clear' until he is certain that it embodies their intent. . . .
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> "In the case of international agreements this necessity would appear all the more urgent. The moment that a nation challenges the correctness of an interpretation of its commitments under a treaty it would seem in accordance with the dictates of reason, of equity, and of prudence to ascertain the grounds for its position. *The interpreter may not properly ignore any evidence which may be adduced, whether of protocols of conferences, memoranda of discussions, diplomatic correspondence, or even of personal declarations by the negotiators, as well as statements by authorities competent to ratify negotiated instruments. The intent and the clear understanding of that intent, whether by one or*

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[22] *Choctaw Nation v. United States*, 318 U.S. 423, 431-432 (1943); *Clark v. Allen*, 331 U.S. 503, 513 (1947); *Nielsen v. Johnson*, 279 U. S. 47, 52 (1929); *Ross v. McIntyre*, 140 U. S. 453, 475 (1891); *Terrace v. Thompson*, 263 U.S. 197, 223 (1923); *United States v. Texas*, 162 U.S. 1, 23 (1896); *Pigeon River Improvement, Slide & Boom Co. v. Cox*, 291 U.S. 138, 158 (1934).

*all the parties concerned, is everything. If there be any doubt on the subject, that doubt must be removed before justice can be accorded."*[33]

Yu, in *The Interpretation of Treaties* (1927), says:

> "So far as the standard of an international agreement is a mutual standard of more than one party to a bilateral act, it seems necessary for those charged with the task of interpretation to exhaust all evidence from the prior and subsequent utterances of the parties so as to ascertain their fixed associations with the standards used." (p. 46.)
>
> "The essence of the principle of interpretation, therefore, is to ascertain through all sources of evidence what is the standard agreed upon, namely, what is the sense which the contracting parties mutually attached to the terms of the agreement." (pp. 136-37.)

Charles Cheney Hyde in volume 2 of his work, *International Law Chiefly as Interpreted and Applied by the United States* (2d rev. ed. 1945), says:

> "Whatever be its form, evidence of the signification attached by the parties to the terms of their compact should not be excluded from the consideration of a tribunal charged with the duty of interpretation." (p. 1471.)

Discussing the practice of this Court, Hyde says:

> "In a word, the conclusions of the Court as to the designs of contracting States have been ex-

[33] Phillip Marshall Brown, "The Interpretation of Treaties," 23 Am. J. Int. L. 819, 822 (1929).

pressed in terms revealing deference for what the evidence established rather than for any other consideration. . . .

"The Supreme Court is not disposed to forbid recourse to, or to decline itself to rely upon, diplomatic exchanges or correspondence indicating the views of negotiators of a treaty, of which the interpretation is uncertain. *The fact of uncertainty is seemingly regarded as made apparent by the divergency of views of opposing litigants, notwithstanding the form of the text.* The Court has not sought to postpone consideration of such evidence until, after exhausting other modes or processes of interpretation, it still remains itself in doubt." (pp. 1481-82.)

Defendant respectfully submits that rehearing should be granted in order that evidence may be presented to show the intention of the parties in their international agreement which contained no cession of the lands and minerals in question but expressly provided that Texas should retain all unsold lands "lying within its limits."

III

**Full development of the evidence will show that Texas' retention of the lands and minerals in its marginal belt was and is in accord with, rather than in conflict with, rules of international and domestic law applicable to this type of property.**

As heretofore shown, a controlling fact question in this case is: *Did the parties to the annexation agreement of 1845 intend that Texas was to retain the lands and minerals underlying the marginal belt within its three-league Gulfward boundaries?*

If given the opportunity, Texas is prepared to present evidence in support of an affirmative answer to this question. The nature of much of this evidence has been discussed under the previous points. In addition, there is other evidence as to the following matters which is pertinent in determining the intention of the parties in 1845 and which will support Texas' position in this case:

(1) the rules of international law in 1845 applicable to the act of union and the type of property in question;

(2) the domestic law of both nations in 1845 in so far as it was applicable or believed to be applicable to the disputed property;

(3) the actual nature of the subordinate economic use and possession of the property (ownership) as distinguished from paramount political powers of sovereignty (*imperium*).

The Court has made conclusions of law and mixed conclusions of fact and law concerning these matters without hearing the evidence which Texas insists would require different conclusions.

The Court recognizes that "equal footing" generally does not apply to property or "economic stature or standing." 70 S. Ct. at 992. However, it applied the discarded "equal footing" clause to the property in question because of its erroneous conclusions that "once low-water mark is passed the international domain is reached" and therefore that "property rights must then be so subordinated to political rights as in substance to coalesce and unite in

the national sovereign." It has been shown that there was no "equal footing" provision in the annexation agreement, and that even if such a provision is implied, there is abundant evidence of a positive character to show that the parties did not intend the meaning and interpretation which the Court now attaches thereto with respect to this property. (*Supra*, pp. 8-21.)

In addition, a thorough examination of the evidence on the points above indicated will show that the property was a part of the national domain of the Republic of Texas and subject to its property laws the same as all of its territory; that it was not then and is not now a part of "the international domain"; that the rights of ownership and economic benefit were and are proprietary in nature and in fact, and were and are severable and separate from political powers of sovereignty; and therefore that an "equal footing" provision would not have the effect of transferring title to the new national sovereign even if there were such a provision in the agreement.

The evidence which Texas asks an opportunity to present on international law, domestic law, and the actual nature of ownership as distinguished from sovereignty, may be summarized as follows:

*International Law*

a. *Territorial and proprietary status of marginal belt lands and minerals:* According to international law (customs, usages, and practices of nations) in 1845 and since that time, the marginal belt within a nation's seaward boundaries was and is considered an integral part of its territory the same as its

lands above low-water mark.[34] The original proprietor acquired full sovereignty (*imperium*) and ownership (*dominium*), subject only to the right of "innocent passage" in the waters.[35] Under international law these rights of *dominium* and *imperium* were and are separate and severable, since there are no international duties and responsibilities which require ownership of the subsoil and minerals by the national sovereign rather than by one of its component States, political subdivisions.[36] Of course, such ownership is always subject to paramount regulatory powers designed to protect the public use of the waters, national security, commerce, and innocent passage.[37]

In view of the foregoing, the Court erred in its conclusion that "once low-water mark is passed the

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[34] Wheaton says: "Within these limits, its rights of property and territorial jurisdiction are absolute and exclude those of every other nation." Wheaton, *Elements of International Law* (1836) 142-143.

[35] See complete agreement of publicists on this point since 1670 compiled in Texas' Brief, appendix, pp. 18-50; also Joint Memorandum of experts appended at p. 54, *infra*.

[36] This view was expressed by the Department of State when asked by the Senate Judiciary Committee for its comment on a pending bill confirming State ownership of these marginal belt lands. The reply was:

"As this matter appears to relate primarily to a domestic question of the respective extent of State and Federal rights, and does not appear to any large extent to fall within the purvue of the activities of this Department, I suggest that other agencies of the Government (for example, the Department of Justice and the Treasury Department) are in a better position to furnish helpful suggestions with respect to the joint resolution." Joint Hearings Before the House Judiciary Committee and a Special Subcommittee of the Senate Judiciary Committee, 79th Cong., 1st Sess. (1945) 20.

[37] Gidel has pointed out that the right of innocent passage is not an absolute right of foreign nations to object to the construction by a littoral nation of *any* obstruction

international domain is reached." 70 S. Ct. at 924. Concerning these words of the Court, Gilbert Gidel, one of the world's foremost authorities on the law of the marginal sea,[38] has written and will testify as an expert:

> "These words show that the distinction between the territorial or marginal sea and the high sea has been completely lost sight of by the Court. Such a statement is in complete opposition to the international law of the territorial sea not only as it is described by all the authors but also as it was manifested by the unanimity of nations represented at the conference for the codification of international law at The Hague in 1930.[39] The marginal sea

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to navigation in the marginal sea but rather a right to complain *only* if the obstruction is erected for the *sole* purpose of denying use of the area to foreign merchant ships in innocent passage. 3 Gidel, *Le droit international public de la mer* (Paris, 1934) 328-329, 331-332. A national sovereign's responsibilities in this regard may be discharged without ownership of the sea-bed and subsoil. See Joint Memorandum, pp. 60 and 64, *infra*.

[38] Author of *Le droit international public de la mer* (The Public International Law of the Sea) (Paris, 1932-1934), 3 vols., the most comprehensive work in existence on the subject. Gidel is President of the Curatorium of the Academy of International Law at The Hague and represented France at the 1930 Hague conference for the Codification of the Law of Territorial Waters.

[39] The official view of the United States as expressed by the Department of State at this conference was:

> "The sea-bottom and subsoil covered by the territorial waters, including fish and minerals, are the *property* of the United States or of the individual States where they border." Reply of the United States to the Bases of Discussion, March 16, 1929, League of Nations Conference for the Codification of International Law, Bases of Discussion, Vol. II—Territorial Waters. Doc. No. C. 74.M.39.1929.V. p. 128.

> comprises a part, as have proclaimed the texts established at this conference, not of the 'international domain,' but on the contrary of the territory of the riparian owner. The 'international domain' begins only at that point where the high sea begins (beyond the marginal sea and beginning at its line of departure).
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> "Thus to argue for a claimed inclusion of the territorial sea in the 'international domain' in order to infer the subordination of property rights to political rights 'as in substance to coalesce and unite in the national sovereign' is to commit an evident paralogism."

The sea bed and subsoil of the marginal sea being a part of the territory of a littoral state in and since 1845 and not a part of the "international domain," the domestic law of the Republic of Texas prior to annexation, and of the United States and the State of Texas since annexation, governs the rights in the area. Other nations have no rights or claims therein. There is no more possibility that "the very oil about which the state and nation here contend might become the subject of international dispute and settlement" (70 S. Ct. at 924) than that the oil beneath the inland waters and uplands within the territory of the United States may give rise to similar disputes—that is, unless this Court insists on its theory that the marginal sea within Texas' original boundaries is "international domain" and as such is shared in ownership by the family of nations.[40]

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[40] The theory of ownership by the family of nations within territorial waters up to low-water mark has been espoused since 1939 by Congressman Sam Hobbs of Alabama, but has

b. *Effect of the absence of express cession:* Under international law as it existed in 1845, where, in a voluntary act of union between independent nations, there was no general cession of all territory, the marginal belt lands and minerals of the annexed nation did not pass with national sovereignty to the annexing nation. The rights of ownership in these lands and minerals, being proprietary rights as distinguished from political rights, passed only by express cession.[41]

c. *Rule of appurtenance:* Under international law as it existed in 1845, the marginal sea with its sea bed and subsoil was treated as appurtenant to the adjacent uplands. Therefore, it would pass with the adjacent uplands in the case of an outright cession of territory from one nation to another.[42] However, when a nation joined an existing federal state and retained its sovereign right to hold and dispose of all unoccupied lands within its borders, under the

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never been accepted by Congress, the Department of State, the Attorney General, or any recognized authority on international law. Hearings before the Committee on Public Lands and Surveys on S. J. R. 83 and S. J. R. 92, 76th Cong., 1st Sess. (1939) 16; Hearings before the Committee on Interior and Insular Affairs on S. 155, S. 923, S. 1545, S. 1700, and S. 2153, 81st Cong., 1st Sess. (1949) 452.

[41] Vattel, *The Law of Nations* (Chitty's 1st ed. 1834) 265; *Attorney General of Canada v. Attorney General of Ontario*, [1898] A.C. 700, 709-710. See Joint Memorandum, p. 54, *infra*.

[42] *The Grisbadarna Case* in Scott, *The Hague Court Reports* (New York 1916) 12, 127. (The cession in this case occurred in 1658).

rule of appurtenance it also retained its marginal belt lands."[43]

## Nature of Evidence

These foregoing points and the type of supporting evidence as to the customs, usages, and practices of nations in 1845 are summarized by ten of the world's leading experts in the fields of international law and jurisprudence in a joint memorandum attached hereto at pp. 54-69. It has been the practice of this and other courts to hear the testimony and evidence accumulated by such authorities on questions of international law and practices of nations. In *Oklahoma v. Texas*, 253 U.S. 465, 471 (1920), a controversy as to the ownership of a riverbed in which the status of international law as of the years 1819, 1828, and 1838 was pertinent, this Court ordered that evidence be taken

> ". . . in respect to the governmental practice on the part of all governments and states concerned at the time, bearing upon the construction and effect of the said treaty."

Such a procedure is equally necessary and appropriate in this case.

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[43] Oppenheim states the rule as follows:

"The object of cession is sovereignty over such territory as has hitherto already belonged to another State. As far as the Law of Nations is concerned, every State as a rule can cede a part of its territory to another State, or by ceding the whole of its territory can even totally merge in another State. However, since certain parts of State territory, as for instance rivers and the maritime belt, are inalienable appurtenances of land, they cannot be ceded without a piece of land." 1 Oppenheim, *International Law* (7th ed. Lauterpacht, 1948) 499-500, § 215.

*Domestic Law*

a. *The Republic of Texas:* The majority opinion does not question Texas' original title and its distinction from sovereignty under the domestic law of the Republic of Texas. In this connection, the majority opinion says:

> "We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. In other words we assume that it then had the *dominium* and *imperium* in and over this belt which the United States now claims." (70 S. Ct. at 923.)

The domestic law of the Republic of Texas was in accord with the international law as to the distinction and severability between ownership (economic use) of this property and governmental powers of sovereignty over it. This domestic law was the common law, adopted as to all of the property except the minerals.[44] As to the minerals, the Republic retained the Mexican civil law of ownership in trust for the people separate from the soil and sovereignty. Under this mineral law the separate mineral estate did not

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[44] Under the common law the bed and subsoil of the marginal belt was severable from sovereignty even to the extent of permitting prescription by, and conveyances to, individuals, subject to non-interference with public use and sovereign powers over the waters. *Shively v. Bowlby*, 152 U.S. 1, 13 (1894); *Lord Fitzhardinge v. Purcell*, [1908] 2 Ch. 139 (Sup. Ct. of Judicature, Chan. Div.). See note 36, *supra*.

pass with the soil or with sovereignty or by any means except express conveyance."

It is pertinent to examine the foregoing status of property ownership under the domestic law of Texas before it joined the Union in order to determine whether and to what extent the act of union was intended to alter this pre-existing status. Here the answer is clear from the Constitution of Texas which was approved by the United States Congress as being "in conformity to the provisions" of the annexation resolution. (See pp. 15-16, *supra*.) It provided:

> "The rights of property . . . which have been acquired under the Constitution and laws of the Republic of Texas . . . shall remain precisely in the situation which they were before the adoption of this Constitution." (Article VII, Section 20.)[46]
>
> "All laws and parts of laws in force in the Republic of Texas . . . shall continue and remain in force as the laws of this State, until they expire by their own limitation, or shall be altered or repealed by the Legislature thereof." (Article XIII, Section 2.)[47]

Defendant has many records, maps, letters, and other evidence which will show that the Republic of Texas claimed and used the lands and minerals in question, that it had knowledge of their value and economic uses and treated them separate and apart from governmental powers, and that the intention of

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[46] Texas Brief 113-24; *United States v. Castillero*, 2 Black 17 (1862); *Moore v. Smaw*, 17 Cal. 199 (1861).

[47] 2 Gammel's Laws of Texas 1293-94.

[47] *Id.* at 1299.

the parties to the annexation agreement was not to cede but to retain this property.

b. *The United States*: As heretofore shown, the United States did not and does not now claim that of this property ownership (as distinguished from paramount governmental powers) is necessary to the effective exercise of its sovereign powers or to its control and regulation of the use of the overlying waters.[48]

The power of Congress to deal with such property was recognized as being "without limitation" in the *California* case.[49] Its power to convey these lands and minerals to the States and good faith claimants without parting with governmental powers or sovereignty (and therefore its power to agree that Texas was to retain its lands and minerals in the first instance) is clearly recognized.[50] Congress had the full power and authority to agree that Texas should keep its lands and minerals below tide water when it entered the Union just as it now has the power to quitclaim land below low-water mark on which much of the city of Boston,[51] Atlantic City piers, and Miami Beach hotels and piers have been built.

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[48] See note 19, *supra*.

[49] See pp. 23-24, *supra*.

[50] See notes 20, 21, *supra*. The State sovereignty cases applicable to inland waters cited in the majority opinion as being analogous here in reverse recognize that the ownership (economic use) of submerged soil and minerals may be severed from the sovereign without destroying any of its political rights or sovereignty. See especially quotation from *Weber v. Board of Harbor Com'rs*, 18 Wall. 57 (1873) contained in note 8 of majority opinion. (70 S. Ct. at 923.)

[51] Boston Bay, being more than ten miles wide from headland to headland, would be subject to the *California* case according to the memorandum of the United States (p. 20) submitted to the special master in that case on August 12, 1949.

### *Actual Practice Separates Ownership from Sovereignty*

Having ceded to the United States its powers of national sovereignty relating to "foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like," Texas has recognized and admitted throughout this case that the ownership and use of its retained lands and minerals are subject to, and cannot interfere with, these national powers in the area in controversy any more than elsewhere within its boundaries.[52] Such powers are not in controversy here. This lawsuit actually involves only the ownership and economic benefits of the land and minerals. This was admitted by plaintiff.[53]

A full development of the evidence as to the actual uses of this property before and since 1845 will demonstrate that the contracting parties knew and followed the distinction between ownership (subordinate economic use and benefit) and sovereignty (paramount political powers) here the same as in the case of all other property within Texas' boundaries. It will further show that the State of Texas has been in continuous possession and full enjoyment of the land and its economic benefits since 1845 without

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[52] First Amended Answer p. 5; See Texas' Brief, pp.6-16.

[53] To eliminate any confusion between the proprietary right involved in this controversy and governmental powers which are not involved, the United States termed it:

> "whatever is the most accurate description of the right to take and enjoy the complete benefit of the mineral and other resources of the bed of the sea." (Plaintiff's brief, p. 16.)

such possession and use having resulted in a single instance of conflict or interference with the national governmental powers relating to commerce, navigation, defense, and international affairs.

It will show that the nation's international responsibilities have not been affected by the State's exercise of ownership of these lands and minerals any more than by State ownership of the lands and minerals under the Rio Grande River, which lies between the United States and Mexico, or under the Great Lakes between the United States and Canada, which have been held to be open seas.[54] the rights of ownership in the area are subject to, and have been exercised with due respect for, the international agreements, commitments, and responsibilities of the federal government, just as they are with respect to other property in all other areas of the State.

The paramount powers over commerce and navigation have been protected by federal laws which require that physical structures and other uses of lands under these waters must be approved by the United States Chief of Engineers the same as in inland waters.[55]

Nor has exercise of the power of national defense required that the ownership of these lands and minerals be in the federal government. In exceptional instances, when ownership of specific tracts was thought to be necessary, deeds have been sought and

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[54] *United States v. Rodgers*, 150 U.S. 249 (1893); *Illinois Central Ry. v. Illinois*, 146 U.S. 387 (1892).

[55] 30 Stat. 1151. As shown in Texas' Brief, pp. 10-11, the only wells now producing oil from this area do not touch the waters, the derricks being on the shore and the pipe being "slant drilled" to the subsoil lying beneath the waters. Thus they cannot possibly interfere with navigation, commerce, and public use of the waters.

obtained by the United States from the State.[56] Security measures necessary for the protection of the Texas coast can be shown to have been enforced by the federal government through two wars without ownership of the property. As to the oil and other minerals which have been needed for national defense, the federal government has always acquired them by outright purchase or under its powers of eminent domain. It has not heretofore taken without compensation this substance of economic value under the guise of regulation or protection. Oil requirements for the nation have been and can be met here under State operations the same as elsewhere in the State.[57]

The natural separation of the economic benefits of ownership from national governmental powers relating to commerce, navigation, defense, and international affairs is nowhere better demonstrated than in the federal proposal that property rights in the marginal belt be managed by the Department of Interior separately and apart from the control of

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[56] This was the procedure followed with reference to two sites for jetties extending over 2 miles into the Gulf off Galveston Island; a lighthouse site "covered by 4 or 5 feet of water"; and "tidelands" lying below low-water mark and adjoining Fort San Jacinto Reservation off the east end of Galveston Island. See Texas' Brief, p. 186 and first map opposite p. 4.

[57] Testifying concerning the ability of industry to make oil available in times of peace and war under the present policy of State control, former Secretary of the Interior Krug said:

> "They have done a miraculous job. I think they will continue doing a miraculous job, whether or not the United States gives up its ownership of these lands to the States." Report No. 1778, House of Representatives, 80th Cong., 2d Sess. (1948), by the Committee on the Judiciary on H. R. 5992.

defense and international responsibilities exercised by the Department of Defense and the Department of State, respectively.[58]

The evidence will show that the Department of Interior, if permitted to take over, would be exercising proprietary rights in the management, leasing, and control of the minerals under this land just as the State has been. No actual exercise of governmetal powers incident to "foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like" will be involved.

The effect of the Court's holding is to permit the federal government not only to control the use of these submerged lands in the exercise of its admitted national powers but also to use and appropriate the economic value of the property without relation to the actual exercise or necessity for exercise of those powers. No doctrine of subordination can obscure the fact that this would be a taking of beneficial use without compensation,[59] rather than a restriction regulation, or destruction incidental to the exercise of governmental power.[60]

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[58] S. 923, 81st Congress. This bill, recommended by the Attorney General, Secretary of the Interior, and Secretary of Defense, would authorize the Department of the Interior to lease the lands to private lessees for development of the oil and other natural resources and to put the money in the federal treasury.

[59] *United States v. Carmack*, 329 U.S. 230 (1946).

[60] The distinction between a taking of beneficial use without compensation (prohibited by the Fifth Amendment) and a non-compensable destruction resulting from the exercise of a national power has been uniformly recognized by this Court. *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923); *Legal Tender Cases*, 12 Wall. 457 (1870); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82 (1913).

A full development of the evidence will show clearly the total lack of conflict in the area between the paramount governmental powers of the federal government and the subordinate rights of ownership exercised by the State therein during the past 104 years. Also, it will negative any presumption that the parties intended that lands and minerals in this area were to follow national sovereignty any more than in other areas within the original boundaries of Texas.

There having been no conflict in actual practice between the exercise of the paramount federal powers and the enjoyment of ownership by Texas, there is no basis for concluding that an "equal footing" provision would require this ownership to follow national sovereignty, even if there had been such a provision. Similarly such a provision would afford no ground for ignoring or refusing to give effect to the agreement of the parties that Texas was to retain its ownership of these lands and minerals while at the same time relinquishing its national sovereignty.

IV.

**The procedure employed by the Court in this original action is not in accord with its past practice and is unfair to the State of Texas.**

As heretofore shown, the present original action involves complex issues and more than 100 years of interpretation of an international agreement by the parties. The issues had not been formed by the pleadings except in a most general manner. Defend-

ant could not tell what issues it was obliged to meet until plaintiff's brief was served on February 20, 1950. The defendant had only 33 days thereafter within which to prepare its brief, as compared with 77 days for plaintiff.

On the pleadings alone, without any record, and on the basis of its brief and two hours of oral argument, the State of Texas was required to submit its case to the Court for decision.

Despite the established practice of this Court in cases involving the interpretation of agreements of the type here involved and in the face of repeated requests by Texas for an opportunity to present its evidence, the Court has construed disputed provisions of an agreement between the United States and Texas, which on their face favor the right claimed by Texas, in favor of the United States without giving the State an opportunity to present evidence.

This summary action is without precedent in the legal history of this nation and is a serious departure from the principles governing the established practice of this Court in original proceedings, illustrated by the following pronouncements of three of its Chief Justices—Taney, Fuller, and White:

> ". . . in a case like the present, the most liberal principles of practice and pleading ought unquestionably to be adopted, in order to enable both parties to present their respective claims in their full strength." (Chief Justice Taney in *Rhode Island v. Massachusetts*, 14 Pet. 210, 257 (1840).)

"In the exercise of original jurisdiction in the determination of the boundary line between sovereign states, this Court proceeds only upon the utmost circumspection and deliberation, and *no order can stand in respect of which full opportunity to be heard has not been afforded.*" (Chief Justice Fuller in *Iowa v. Illinois*, 151 U.S. 238, 242 (1894).)

"As we have pointed out, in acting in this case from first to last the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between states involving grave questions of public law, determinable by this Court under the exceptional grant of power conferred upon it by the Constitution, has been the guide by which every step and every conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should not now be lost sight of, *to the end* that when the case comes ultimately to be disposed of finally and irrevocably . . . *there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice after the amplest opportunity to be heard, has in any degree entered into the disposition of this case.*" (Chief Justice White in *Virginia v. West Virginia*, 234 U.S. 117, 121 (1914).)

The petition for rehearing should be granted in order that Texas may have an opportunity to present evidence that its 104 years of possession and recognized ownership have not been by mere sufferance

or circumstance, but have been in accord with the intention of the parties to the annexation agreement in 1845.

## STATEMENT AS TO PLAINTIFF'S PRAYER FOR ACCOUNTING

Plaintiff prayed for an accounting of "all sums of money derived by it [Texas] from the area . . . subsequent to June 23, 1947." Since the question of whether Texas is liable for any money and, if so, the amount, is incidental to the question of ownership,[42] it has not been discussed by the parties in their briefs and arguments or by the Court in its opinion. Neither has an opportunity been afforded for submission of evidence as to the liability of Texas, if any, its good faith, or its offsetting expenditures. Therefore, defendant refrains from going into these matters in this petition without prejudice and on the assumption that further proceedings will be had thereon if this petition for rehearing is not granted.

## CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for rehearing and reconsideration of the majority opinion should be granted and that the majority opinion should be reversed and judgment rendered denying plaintiff's motion for judg-

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[42] Cf. *Mason v. United States*, 260 U. S. 545, 558 (1922); *Gulf Refining Co. v. United States*, 269 U. S. 195, 197 (1925).

ment on the pleadings and dismissing the complaint; or, in the alternative, that plaintiff's motion for judgment should be denied and defendant's motion for the appointment of a special master to hear the evidence should be granted.

Respectfully submitted,

PRICE DANIEL
*Attorney General of Texas*
J. CHRYS DOUGHERTY
JESSE P. LUTON, JR.
K. BERT WATSON
DOW HEARD
BEN H. RICE, III
WALTON S. ROBERTS
CLAUDE C. MCMILLAN
FIDENCIO M. GUERRA
B. THOMAS MCELROY
MARY K. WALL
*Assistant Attorneys General*

ROSCOE POUND
JOSEPH WALTER BINGHAM
MANLEY O. HUDSON
JAMES WM. MOORE
CHARLES CHENEY HYDE
*Of Counsel.*

July 19, 1950.

**Certificate**

The foregoing petition for rehearing is believed to be meritorious and is presented in good faith and not for delay.

PRICE DANIEL
*Attorney General of Texas*

# JOINT MEMORANDUM

# IN SUPPORT OF REHEARING IN

# UNITED STATES v. TEXAS

By

Joseph Walter Bingham
C. John Colombos
Gilbert Gidel
Manley O. Hudson
Charles Cheney Hyde
Hans Kelsen
William E. Masterson
Roscoe Pound
Stefan A. Riesenfeld
Felipe Sanchez Roman

# PERSONAL DATA

**JOSEPH WALTER BINGHAM:** Chairman, The International Law Association Committee on Rights in the Sea Bed and its Subsoil, American Branch; Professor of International Law, Stanford University, 1907-1944; author, *Report on the International Law of Pacific Coastal Fisheries* and numerous articles on international law.

**WILLIAM W. BISHOP, JR.:** Assistant to Legal Adviser Department of State, 1939-1947; Legal Adviser United States Delegation Council of Foreign Ministers and Paris Peace Conference, 1946; author: *The Exercise of Jurisdiction for Special Purposes in High Sea Areas Beyond the Outer Limit of Territorial Waters*, 1949.

**C. JOHN COLOMBOS:** King's Counsel; Rapporteur, International Law Association's Committee on Neutrality, 1924, 1926, 1928, and 1932; author, *International Law of the Sea* (1943), *A Treatise on the Law of Prize* (3rd ed. 1949), and other works on international law.

**GILBERT GIDEL:** Member of the Institute of International Law; President of the Curatorium of the Academy of International Law at The Hague; French delegate, 1930 Hague Conference for Codification of the Law of Territorial Waters; author, *Le droit international public de la mer (The Public International Law of the Sea)* (1932-1934), 3 vols. (4th volume in preparation).

**MANLEY O. HUDSON:** Member and first chairman, United Nations International Law Commission; Judge Permanent Court of International Justice, 1936-1946; American adviser, 1930 Hague Conference for the Codification of International Law; Bemis Professor of International Law, Harvard University, 1923 to present; author of over 300 articles and publications on international law.

**CHARLES CHENEY HYDE:** Former Solicitor of the Department of State under Secretaries Hughes and Kellogg; Professor of International Law and Diplomacy, Columbia University, 1925-1945; author, *International Law Chiefly as Interpreted and Applied by the United States* (2nd rev. ed. 1945), 3 vols., and other works on international law; President of the American Society of International Law, 1946-1949.

**HANS KELSEN:** Legal adviser to the Austrian Government, and draftsman of the Federal Constitution of Austria, 1919-1922; Member of the Constitutional Court of Austria, 1921-1929; author, *General Theory of International Law* (1934), *General Theory of Law and the State* (1944), and other works on international law and jurisprudence.

**WILLIAM E. MASTERSON:** Department of State consultant, 1944-1947; adviser on research in international law, Harvard Law School; author, *Jurisdiction in Marginal Seas* (1929); co-author, *The International Law of the Future* (1944), and author of numerous articles on international law, constitutional law, and jurisprudence.

**ROSCOE POUND:** Professor of Jurisprudence and Dean of Harvard Law School, 1910-1936; Director of National Conference of Judicial Councils, 1938 to date; author of more than 850 books, articles, and addresses on jurisprudence, international law, constitutional law, etc.

**STEFAN A. RIESENFELD:** Professor of Law, University of Minnesota, 1938 to date; Special Consultant, Board of Economic Warfare, 1942-1943; author, *Protection of Coastal Fisheries Under International Law* (1942), and of numerous articles on international and comparative law in German and American legal periodicals.

**FELIPE SANCHEZ ROMAN:** Former member of the Permanent Court of Arbitration at the Hague; member of the Spanish National Academy of Jurisprudence and Legislation; Legal Adviser to Spanish and Mexican Governments; Professor of Civil Law at the Central University of Madrid, 1916-1936.

## JOINT MEMORANDUM

Based upon our individual research and consideration of the pleadings, briefs, and evidentiary materials, each of us has prepared a separate memorandum opinion on the title to the lands and minerals underlying the Gulf of Mexico within the original boundaries of the State of Texas and the rules of international law applicable thereto. These memoranda were written at the request of the Attorney General of Texas prior to the Court's decision of June 5, 1950.

Without collaboration, each of us concluded:

1. The Republic of Texas, as an independent nation, had full sovereignty over and ownership of the lands and minerals underlying that portion of the Gulf of Mexico within its original boundaries three leagues from shore.[1] Under international law and under the domestic law adopted by the Republic of Texas, the ownership (*dominium*) of the subjacent soil and minerals was severable from the paramount governmental powers (*imperium*) employed in the original acquisition and in the regulation and control of commerce, navigation, defense, and international relations.

2. The transfer of national sovereignty and governmental powers relating to interstate and foreign commerce, navigation, defense, and international relations from the Republic of Texas to the United States in 1845 did not effect a transfer or relinquish-

[1] The First Congress of the Republic of Texas, on December 19, 1836, fixed the boundaries as follows: "... beginning at the mouth of the Sabine River, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande." 1 Laws, Republic of Texas, p. 133; 1 Gammel's Laws of Texas 1193-1194.

ment of the ownership of the lands and minerals above described. International law, as it existed in 1845, did not imply or require a cession of these proprietary rights with a transfer of national sovereignty.

3. The Republic of Texas, upon annexation, did not cede to the United States the ownership of the controverted 2,608,774 acres of lands and minerals within its original boundaries, but specifically retained this ownership under the terms of the agreement between the Republic of Texas and the United States.

4. A contrary position, first asserted by the United States 103 years after the international agreement of annexation, creates a dispute as to the meaning of the controlling documents. Under such circumstances either litigant should be entitled to present evidence bearing upon the intention of the contracting parties.

5. Available evidence of the status of international law, reflected by the customs, usages, and practices of nations in 1845 and since that date, will support the foregoing conclusions of fact and law.

After studying the majority and dissenting opinions of June 5, 1950, each of us has written a separate memorandum directed to issues raised by the majority opinion which we respectfully submit require a rehearing and judgment for Texas or at least a trial on the evidence. In the interest of brevity, this joint memorandum is submitted as a summary of our individual opinions and of the evidence of relevant customs, usages, and practices of nations which we will develop fully if given the opportunity at a trial of the case on its merits.

## I.

In the first instance, the majority opinion in its concept of the nature of a nation's sovereignty over and ownership of marginal belt lands and minerals is not in harmony with international law as it existed in 1845 and as it continues to exist at the present time.

The majority has written:

> "... once low-water mark is passed the international domain is reached. Property rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign. . . ."[2]

There is no accepted authority in international law for this notion of "international domain." To the contrary, it may be said that customs, usages, and practices of nations in and since 1845 indicate complete agreement that the territorial marginal sea and its subjacent soil and resources within its boundaries are under the full sovereignty of the littoral nation, subject only to the accepted rules of "innocent passage" through the overlying waters.

Under international law as it existed in and since 1845, the "international domain" did not, and does not now, begin at the low-water mark of a littoral state. *Vis-a-vis* other nations, the area of a littoral state between low-water mark and the seaward limit of its marginal belt was and is in the same category

[2] 70 S. Ct. at 924.

as its inland waters, uplands, and other territory within its boundaries.[3] As said by Wheaton in 1836,

> "Within these limits, its rights of property and territorial jurisdiction are absolute and exclude those of every other nation." Wheaton, *Elements of International Law* (Philadelphia, 1836) 142-143.

Sala wrote in 1845 that customs and usages of nations have "converted the sea as to this portion thereof into property no different than the lands occupied by them."[4] Hautefeuille described territorial seas as under littoral state dominion "in the same manner and by the same title as the land."[5] Many writers term it a continuation of the continental territory. Olivart says "the jurisdiction of the state over its territorial sea is exclusive as it is over its land territory."[6] Among the jurists and publicists

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[3] The only limitation or exception is that by mutual consent and established practice there exists a right of "innocent passage" for ships of other nations. But as said by the Italian publicist, Scipione Gemma: "The limitations implied by the right of innocent passage of foreign vessels and by certain exemptions applicable to them in matters of civil and criminal local jurisdictions exercised by the coastal nations are not enough to consider the littoral sea as something different from the national territory." Gemma, *Appunti di diritto internazionale* (Bologna, 1923) 187.

[4] Sala, *Sala Mexicana, o sea La Ilustración al Derecho Real de España* (Mexico, 1845), vol. 2, p. 11.

[5] Hautefeuille, *Des droits et des devoirs des nations neutres en temps de guerre maritime.* (Paris, 1848) 231. He continued: "There is continuous, complete, and absolute possession, as there might be of a river, a lake, or piece of land territory." (p. 232.)

[6] 1 Olivart, *Tratado de Derecho Internacional Público* (Madrid, 1903) 204.

there is almost complete unanimity of opinion on this point.[7]

It is respectfully urged that no matter what the United States may gain in this case by a holding that the Texas marginal sea is "international domain," such gain could be far outweighed by the consequent gratuity to other nations. Implicit in the denomination of the area as "international domain" is the possibility of other nations having rights therein other than innocent passage through the waters. Spain, Mexico, France, England, Russia, and other nations can make no reasonable assertion of an interest in the oil and other minerals within the three-league Gulfward boundary of Texas so long as this Court recognizes that the area was removed from international domain when it became a part of the Republic of Texas. This was accomplished by the Republic of Texas in accordance with international law as recognized at the time by the countries named and by all other civilized nations. A contrary conclusion by the United States Supreme Court could well be used by other nations as an opening for claims not now asserted.

The Court's holding in this regard is contrary to the official position of the United States as expressed

[7] See "Summary of Available Opinions of Jurists and Publicists—1670-1950," pp. 18-50 of the Appendix to Brief for the State of Texas in Opposition to Motion for Judgment. See especially quotations from Molloy and Pufendorf (p. 18), Vattel (p. 19), Lampredi (p. 20), Rayneval (p. 21), Azuni and Schmalz (p. 22), Wheaton (p. 24), Cussy and Gardner (p. 27), Casanova (p. 29), Field (p. 30), Fiore and Martens (p. 31), Pradier-Fodéré (p. 33), Hershey (p. 38), Fenwick and Möller (p. 43), Bustamante (p. 45), Gidel and Baldoni (p. 46).

by the Department of State and by Presidential Proclamations. The official view of the United States at the League of Nations Conference at The Hague in 1930 was declared as follows:

> "... the sea-bottom and subsoil covered by the territorial waters, including fish and minerals, are the property of the United States or the individual states where they border."[8]

The Continental Shelf Proclamations and Executive Orders of the President of the United States on September 28, 1945, do not regard the bed of the continental shelf as "international domain." On the contrary, the Proclamation regards the land and resources below low tide "as an extension of the landmass of the coastal nation and thus naturally appurtenant to it" and wholly unaffected by "the character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation."[9] The Executive Order recognizes that ownership of the subsoil and sea-bed is possible either in the States or the United States.[10]

There is no authority in international law for the doctrine that property rights in the marginal sea must "be so subordinated to political rights as in substance to coalesce and unite in the national sover-

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[8] Reply of the United States to the Bases of Discussion, March 16, 1929, League of Nations Conference for the Codification of International Law, Bases of Discussion, C. 74. M. 39. 1929. V. p. 128.

[9] 3 C. F. R., 1945, Supp., Proc. 2667, 13 Dept. State Bull. 484, 485 (1945).

[10] 3 C. F. R., 1945, Supp., E. O. 9633.

eign." On the contrary, international law in and since 1845, and all domestic law with which we are acquainted, recognizes that political rights *(imperium)* are separate and severable from property rights *(dominium)* in the subsoil and minerals of the marginal belt the same as in any other soil and minerals within a nation's territory.[11] The use of the soil may be more limited by governmental restrictions and regulations designed to protect public use, innocent passage, and navigation of the waters generally, but restrictions and regulations on property use have not been understood to vest ownership of the property in the governmental power which imposes the restrictions and regulations.

There is no obligation or responsibility of a nation to other nations which requires it, rather than one of its political subdivisions, to own the soil and minerals within its territorial marginal belt, so long as it has governmental powers which guarantee innocent passage for ships of other states. The exercise of this responsibility and all other responsibilities connected with foreign and interstate commerce, defense, and international relations, is wholly separate from and does not depend upon the economic use and profits connected with the proprietorship of this subsoil and minerals any more than it does the subsoil and minerals beneath uplands, inland waters, and all areas of the nation's territory.

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[11] It is believed that evidence of the practice of nations in 1845 will show that they treated original ownership of the subsoil and minerals of the marginal belt as within the same legal regime and property law as was applicable to other unsold and unappropriated lands within their boundaries.

Such was the status of international law when the Republic of Texas and the United States entered into their agreement for the annexation of Texas. A transfer of marginal sea lands and minerals was not then implied in a transfer of national sovereignty. An express cession or other clear terms indicating a transfer of these proprietary rights was as necessary then as it would be now to effect such a result. As recently said by one of the co-authors of this memorandum:

> "In this day when world governments are being planned it is important that *dominium* is not confused with or inextricably tied to *imperium*. . . .
>
> "Assume that all of this nation's powers of external sovereignty, international relations, and defense were transferred to a United Nations of the World. This transfer of external sovereignty should not be held to carry with it any proprietary rights theretofore acquired by the United States in the marginal belt of the original States and California in the absence of a cession of the property.
>
> "Such is the situation which existed between Texas and the United States in 1845. Texas transferred its external sovereignty and certain enumerated properties which then pertained to its national defense. It ceded no other property. This is confirmed by a specific reservation of all 'vacant and unappropriated lands lying within its limits.' The subsoil and minerals remained in the State just as the subsoil and minerals of the California belt would remain in the United States if it should transfer external sovereignty to a larger federation of States without ceding

its rights of a proprietary nature beneath the marginal sea of California."

## II.

Even if the Court believes that the lands and minerals in question would ordinarily pass to the United States with national political rights, this would not be true if the parties made an agreement to the contrary at the time of annexation.

In this case there is an international agreement which contains a specific retention of lands lying within the limits of the Republic of Texas.[13] It is of the same nature and has the same effect as a treaty or contract between independent nations. Therefore, rules of interpretation applicable to treaties, conventions, and other international agreements apply. The object of the interpretation of an agreement of this nature is to discover the understanding and intention of the parties at the time the contract or agreement was entered into.

Texas has a specific allegation at page 15 of its First Amended Answer that:

> "By these acts on the part of the United States and the Republic of Texas, when construed, as they must be, in the light of the intention of the contracting parties, there was a binding agreement between the two independent sovereigns that upon annexation Texas would not cede to the United States any, but that the newly cre-

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[12] Roscoe Pound, "Rights Involved in United States v. Texas," pp. 10-11, Memoranda and Appendix, Brief for the State of Texas in Opposition to Motion for Judgment.

[13] 5 Stat. 797; 2 Gammel's Laws of Texas 1225, 1228.

> ated State would retain all, of the lands, minerals, and other things lying beneath that part of the Gulf of Mexico within the original boundaries of the Republic, as well as the right to take, use, and develop the lands and minerals, subject only to the dominion and paramount powers of the United States as recognized in section 2, paragraph II above."

If it be found, as alleged by Texas, that the parties intended by the terms of the agreement that the lands and minerals beneath the marginal belt were to be retained by Texas the same as other lands and minerals within its limits, no other provision of the agreement should be permitted to defeat this intention. Thus, a controlling issue in this case is the fact question of whether the parties intended the retention clause to be effective to the extent of the "limits" of Texas, as the terms imply, or only as far as low-water mark.

The applicable rule in such cases is stated in the majority opinion as follows:

> ". . . If there were a dispute as to the meaning of documents and the answer was to be found in diplomatic correspondence, contemporary construction, usage, international law and the like, introduction of evidence and a full hearing would be essential."[14]

If this case is not determined in favor of Texas on the law and terms of the documents alone, it should not be determined against Texas without allowing it the opportunity for introduction of evidence and a

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[14] 70 S. Ct. at 922.

full hearing. It is our opinion that the answer to the dispute will be found in diplomatic correspondence, contemporary and subsequent construction, usage, and international law under which the parties were dealing in 1845.

In so far as international law is concerned, it was possible in 1845 for one nation to join another and retain the lands and minerals underlying the marginal sea within its boundaries.

This was and is possible also in so far as the domestic law of the United States is concerned. Counsel for the United States itself have not contended that ownership of the marginal belt lands and minerals is an inseparable attribute of national sovereignty.[15] In the Government's brief in *United States v. California*, 332 U.S. 19 (1947), it was said:

> "We do not argue that the effective exercise of the foregoing powers (national defense, commerce, international relations) granted to the Federal Government by the Constitution would be impossible without ownership of the marginal sea." (p. 89.)

The Court, in that case, also recognized that ownership of this property is not a necessary incident of national sovereignty or essential to the exercise

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[15] Solicitor General Perlman, in answer to a question by Mr. Justice Reed during the argument on the Motion for Leave to File the Complaint herein, said that if the United States owns the property, it could convey it to the States. His words:

> "Oh, yes, Congress could give whatever title it has, whatever rights it has, to the States." Argument, *United States v. Texas*, May 9, 1949, Reporter's Transcript, p. 6.

of federal constitutional powers over the area, when it said that the power of Congress to deal with such property "is without limitation."[18]

Implicit in the powers of the United States Congress to convey these lands and minerals to the states and good faith claimants, and to admit new states is the power to admit Texas to the Union under an agreement that Texas retain the lands and minerals in the first instance.

The Texas Annexation Agreement of March 1, 1845, whether classed as a treaty, act, or joint resolution, was passed by Congress and carried into effect by the President, who is charged with the conduct of international affairs. This agreement provides that:

> "... said state, when admitted into the Union ... shall also retain all the vacant and unappropriated lands lying within its limits. ..."

Thus as to Texas, Congress has acted with regard to the specific question before this Court. The Congress of Texas, and the people in convention assembled, agreed to annexation with this as one of the

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[18] *United States v. California*, 332 U.S. 19, 27. Also in stating that valuable improvements made in good faith under State titles are not ground for a different judgment, the Court added: "But beyond all this we cannot and do not assume that Congress, which has constitutional control over Government property, will execute its powers in such way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission. See *United States v. Texas*, 162 U.S. 1, 89, 90; *Lee Wilson & Co. v. United States*, 245 U.S. 24, 32." *Id.* at 40.

"conditions" and "guarantees."[17] There is no evidence in the terms of the agreement that the parties meant to retain only those lands lying above low tide on the coast. The retention clause says *"lands lying within its limits."* Neither is there any evidence in the terms that the parties intended the lands and minerals of the three-league marginal belt to "coalesce and unite" with the political powers of national sovereignty transferred to the United States. Under the domestic law of the Republic of Texas, these lands and minerals involved rights of property, severable from sovereignty, but originally held by the sovereign in trust for the people.

The constitution of the new State, adopted in accordance with the terms of the annexation agreement and as a part of the annexation procedure, indicates that these property rights were to remain as they were under the laws of the Republic of Texas. It included this provision:

> "The rights of property . . . which have been acquired under the Constitution and laws of the Republic of Texas . . . shall remain precisely in the situation which they were before the adoption of this Constitution."[18]

This Constitution was laid before the United States Congress and was approved by that body in the final Act of Admission as being "in conformity

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[17] 5 Stat. 797; 2 Gammel's Laws of Texas 1225, 1228. The Annexation Resolutions of the two nations are set out at length on pages 58-62 of the Appendix to Brief for the State of Texas in Opposition to Motion for Judgment.

[18] Art. VII, Sec. 20, Constitution of 1845; 2 Gammel's Laws of Texas 1293-94.

to the provisions" of the annexation resolution. 9 Stat. 108.

On the basis of these documents it would appear that Texas retained the lands and minerals in question by the specific agreement and approval of the United States Congress. The only doubt cast on the meaning of the documents is the contention by the United States that the "retention clause" was not intended to include lands and minerals below low tide and the statement in the majority opinion that an "equal footing" clause in the annexation resolution of March 1, 1845, effected a relinquishment of the property to the United States.

The "equal footing" clause in the March 1 resolution for annexation of Texas was contained in Section 3, which was an alternative proposal never submitted to, or considered or accepted by, Texas. Sections 1 and 2 contained the "proposals, conditions, and guarantees" submitted by the President of the United States and accepted by the Congress and the people of Texas. These sections provided that Texas retain its lands and pay its own debts. It is significant that they contained no "equal footing" clause. Only the unilateral final act of admission referred to "equal footing," but it also recited that admission was granted in accordance with the "proposals, conditions, and guarantees contained in the first and second sections" of the March 1, 1845, annexation resolution. It could not have the effect of taking from Texas lands and minerals which had been specifically retained by the "proposals, conditions, and guarantees" theretofore agreed upon. Texas pleads that it has evidence which will show that no such meaning or effect was intended by the contracting parties.

If, upon rehearing, judgment is not rendered in favor of the State of Texas on the basis of the terms contained in Sections 1 and 2 of the annexation agreement and its failure to cede the lands and minerals, it would indicate that some doubt still exists in the minds of the majority as to the meaning of the annexation agreement and the intention of the parties. In that event, Texas should be entitled to an opportunity to present its evidence. This was requested by Texas in its motion for the appointment of a Master and in its brief in opposition to the motion of plaintiff for judgment on the pleadings. We submit that the Court should reconsider its ruling denying Texas this opportunity to develop evidence as to the intention of the parties to this international agreement.

Evidence which can and will be submitted as to the customs, usages, and practices of nations in and since 1845, the nature of the sovereignty over and ownership of marginal belt lands and minerals in international law, and all other relative interpretative matters, will support the contentions of the State of Texas as to the law and facts applicable to this case.

Respectfully submitted,

JOSEPH WALTER BINGHAM
C. JOHN COLOMBOS
GILBERT GIDEL
MANLEY O. HUDSON
CHARLES CHENEY HYDE
HANS KELSEN
WILLIAM E. MASTERSON
ROSCOE POUND
STEFAN A. RIESENFELD
FELIPE SANCHEZ ROMAN

July 14, 1950

CONCURRENCE

Time has not permitted me to assist in the preparation of this memorandum, but I am fully in accord with the position taken by the State of Texas in its brief and argument in this case. I wholeheartedly concur in the opinion that there should be a rehearing, and a judgment for Texas or at least a trial on the evidence.

WILLIAM W. BISHOP, JR.

July 15, 1950

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CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950

No. 13, Original

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

## OBJECTIONS TO THE DECREE PROPOSED BY THE UNITED STATES AND MEMORANDUM IN SUPPORT OF OBJECTIONS

PRICE DANIEL
*Attorney General of Texas*
J. CHRYS DOUGHERTY
JESSE P. LUTON, JR.
K. BERT WATSON
DOW HEARD
B. THOMAS MCELROY
*Assistant Attorneys General*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950

No. 13, Original

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS
*Defendant*

## OBJECTIONS TO DECREE PROPOSED BY THE UNITED STATES

Subject to the Court's action on the petition for rehearing this day filed, the State of Texas makes the following objections to the entering of the decree proposed by plaintiff:

1. It objects to that part of paragraph 2 enjoining the State of Texas and others from carrying on certain activities in an area not yet defined with sufficient definiteness.

2. It objects to that part of paragraph 2 of the proposed decree enjoining defendant's "lessees and other persons claiming under it" from carrying on activities in the area under leases issued prior to the filing of this suit because:

a. They are not parties to this suit.

b. Stoppage of this production of oil would be against public policy and detrimental to the best interests of the State and Nation.

3. It objects to that part of paragraph 3 fixing the beginning date of the State's accounting as June 23, 1947, instead of the date of the Court's decision, June 5, 1950, or, in the alternative, the date the Complaint was filed, May 16, 1949.

4. It objects to the wording of paragraph 3 because it does not clearly state that the existence and extent of Texas' liability, if any, for money received is yet to be determined and does not provide the means for such determination.

## MEMORANDUM IN SUPPORT OF OBJECTIONS TO PROPOSED DECREE

Pending before the Court is defendant's petition for rehearing, directed to the Court's opinion as amended by its order of October 16, 1950. By its amendments to the original opinion of June 5, 1950, the Court has based its entire decision upon one clause in the unilateral act of the United States Congress formally admitting Texas to the Union in accordance with "proposals, conditions, and guarantees" theretofore agreed upon by the two nations. In doing so, defendant respectfully urges that the Court erred in disregarding the specific "proposals, conditions, and guarantees" previously agreed upon, one of which was the provision that the new State "shall retain all vacant and unappropriated lands lying within its limits." Defendant further urges that the Court erred in denying Texas the opportunity to present evidence proving the allegations of its affirmative pleading that by such specific annexation "proposals, conditions and guarantees" and the formal act of admission the parties intended

that the lands in controversy were not to pass to the United States but were to be retained by the State of Texas.

The nature of the errors presented makes particularly inappropriate the entry of any decree until the Court has acted on the petition for rehearing and permitted full development of the case on the merits. Thereafter, it is earnestly believed that there will be no necessity for the type of decree proposed by plaintiff.

Subject to the Court's action on the pending petition for rehearing and only in the event the petition is overruled, the State of Texas makes the following objections to the proposed decree:

**1. An injunction should not issue before the area in which the injunction is to be operative has been clearly defined.**

Paragraph 2 of the proposed decree would enjoin defendants and others from carrying on certain activities "upon or in the submerged area described in paragraph 1 hereof." The area described in paragraph 1 includes the lands

> ". . . lying seaward of the ordinary low-water mark on the coast of Texas, and outside of the inland waters, extending seaward to the outer edge of the continental shelf and bounded on the east and southwest, respectively, by the eastern boundary of the State of Texas and the boundary between the United States and Mexico."

Plaintiff has yet to indicate its position in this case with respect to the criteria to be adopted for

ascertaining "the ordinary low-water mark" on the coast of Texas and in determining what waters are inland waters. The difficulties surrounding such a determination are indicated in the *California* case, where no segment of the line of demarcation along the California coast has been determined, although the opinion in that case was handed down on June 23, 1947.

No injunction should be granted until the Court has delineated the boundary line between the lands beneath bays and other inland waters and those beneath the marginal sea. Until that line has been established by a decree of this Court, defendant cannot know whether it will violate the injunction if it leases areas which it believes are beneath the inland waters and hence within its domain. Plaintiff recognizes that problems may arise in defining the line between the marginal belt and inland waters.[1] However, defendant disagrees with plaintiff's view that "there is no present necessity" to determine with greater definiteness any particular segments of the boundary of the area in controversy. Along a large extent of the Texas coast, for example from the mouth of the Rio Grande to Matagorda Bay, Texas contends that the low-water mark for measuring the marginal sea is not on the mainland but on the offlying islands and shoals. Several proven mineral deposits extend beneath the mouths of the open bays and into the adjacent Gulf while others lie beneath the tideland beaches and the adjacent Gulf. State leases on these areas embrace both lands which be-

[1] Plaintiff's Memorandum in Support of Proposed Decree, p. 6.

long to the State and lands which are now held to be subject to the paramount rights of the United States.

Definitive location of the line of inland waters is necessary to determine the areas on which the State may continue its operations and make future leases without risking violation of the injunction plaintiff seeks.

The State still owns a tideland belt of considerable width above low-water mark along the entire gently sloping Texas coast, much of which is included within existing leases and much of which will be included in future leases. The line of demarcation between this land and the marginal belt area to be covered by an injunction should be fixed before any injunction issues.

This is in line with the rule that no injunction should issue which is so indefinite that the defendant cannot tell whether it is obeying or violating the writ. "An injunction should be so clear and certain in its terms that defendant may readily know what he is restrained from doing." 43 C.J.S. 932, Injunctions, Sec. 206(b) and cases cited therein.

For this reason among others, specific injunctive relief was not sought, or granted, in the *California* case, where an analogous problem exists. Paragraph 2 of the decree in the *California* case simply reads as follows:

> "The United States is entitled to the injunctive relief prayed for in its complaint."[2]

It is respectfully urged that paragraph 2 of the proposed decree should be stricken or reworded so

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[2] 332 U.S. 804, 805.

as to provide that, though the United States may be entitled to injunctive relief, an injunction will issue only after the low-water mark and the line of inland waters shall have been defined by agreement or by further proceedings for that purpose.

**2. Lessees and other persons not parties to this action should not be enjoined by this decree.**

Defendant objects to that part of paragraph 2 of the proposed decree which would enjoin defendant's "lessees and other persons claiming under it" from carrying on activities in the area under leases issued prior to the filing of this suit because:

a. They are not parties to this suit.

b. Stoppage of this production of oil would be against public policy and detrimental to the best interests of the State and Nation.

Plaintiff alleged in its petition that the State had executed leases to various persons and corporations who have paid the State substantial sums of money and entered upon the lands and drilled wells for the recovery of petroleum, gas, and other hydrocarbons. **It is undisputed that all existing leases on the land in controversy were purchased and delivered to lessees more than a year prior to the filing of the complaint in this case.** They were made prior to plaintiff's motion for leave to file the complaint and before the United States gave any notice whatever that it would assert title to the property.

*Lessees Are Not Parties to this Suit*

Although the names of the lessees were readily available to plaintiff, it did not join them as parties

to this action. Texas alone was named as defendant. No person other than the State was served with process, and none came otherwise before the Court.

Plaintiff now proposes that the Court enter a decree restraining the lessees from using their improvements placed upon the leases and from conducting operations upon the leases purchased from the State in good faith. This cannot be done, for the Court has no jurisdiction in this action to restrain the lessees, who are neither parties to this action nor "privies" of the State.

> "The principle is as old as the law and is of universal justice, that no one shall be personally bound until he has had his day in court, which means until citation is issued to him, and opportunity to be heard is afforded." *Mason v. Eldred*, 6 Wall. 231, 239 (1868).

No court can directly adjudicate the rights of a person who is not before the court. *Barney v. City of Baltimore*, 6 Wall. 280 (1868); *Michoud v. Girod*, 4 How. 503 (1845); *Galpin v. Page*, 18 Wall. 350 (1874); *Keegan v. Humble Oil & Refining Co.*, 155 F. 2d 971 (C.C.A. 5th 1946); *Boynton v. Moffat Tunnel Improvement Dist.*, 57 F. 2d 772 (C.C.A. 10th 1932), *cert. den.* 287 U.S. 620; *Ducker v. Butler*, 104 F. 2d 236 (App. D.C. 1939); *Alemite Mfg. Corp. v. Staff*, 42 F. 2d 832 (C.C.A. 2d 1930). As said in *Gregory v. Stetson*, 133 U.S. 579, 586 (1890):

> "It is an elementary principle that a court cannot adjudicate directly upon a person's right without having him either actually or constructively before it. This principle is fundamental."

In this case the lessees are not before the Court, and, therefore, have not had their day in court. Nor are they in "privity" with the State as that term is commonly used in stating the rule that a judgment is conclusive and binding not only on the parties to the action but also on persons who are in privity with them. The rule applies only to persons acquiring rights subsequent to the institution of the suit. *Dull v. Blackman*, 169 U.S. 243 (1898); *Carroll v. Goldschmidt*, 83 F. 508 (C.C.A. 2d 1879), *cert. den.* 169 U.S. 735; *Boulter v. Commercial Standard Ins. Co.*, 175 F. 2d 763 (C.C.A. 9th 1949); *National Lead Co. v. Nulsen*, 131 F. 2d 51 (C.C.A. 8th 1942), *cert. den.* 318 U.S. 758; *General Chemical Co. v. Standard Wholesale Phosphate & Acid Works*, 101 F. 2d 178 (C.C.A. 4th 1939); 1 *Freeman on Judgments* (5th ed. 1925) 966-969, Sec. 440; 2 *Black on Judgments* (1902) 832; 30 *Am. Jur.* 958-959, Judgments, Secs. 225-226.

In *Dull v. Blackman, supra*, the Court quoted with approval the following excerpt from *Freeman on Judgments*:

> "'It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected, occurred previously to the institution of the suit. A tenant in possession prior to the commencement of an action of ejectment cannot, therefore, be lawfully dispossessed by the judgment unless made a party to the suit. . . .'" 169 U.S. at 248.

It concluded:

> "We remark again that while a judgment or decree binds not merely the party or parties subject to the jurisdiction of the Court but also those in privity with them, yet that rule does not avail the plaintiffs in error, for Phelan acquired his rights prior to the institution of the suit in New York and was therefore not privy to that judgment." 169 U.S. at 348.

In *Doctor Jack Pot Mining Co. v. Marsh*, 216 Fed. 261 (D. Colo. 1914), an action for damages for trespass, defendants moved to strike allegations in the complaint to the effect that in 1909 plaintiff filed in that court an action against defendants' lessor wherein plaintiff was declared to be the owner of the property in question and that defendants as lessees of that company were bound by the previous judgment. The facts showed that defendants entered as lessees of the company prior to the institution of the previous suit. In sustaining the motion to strike, the court quoted with approval from 2 *Black on Judgments* 832-833 (1902), as follows:

> ". . . privies, in such sense that they are bound by the judgment, are those who acquired an interest in the subject-matter after the rendition of the judgment; if their title or interest attached before that fact, they are not bound unless made parties." 216 Fed. at 263.

The lessees of the State, all of whom acquired their leases prior to the institution of this action, are, therefore, not in privity with the State and are not properly subject to any injunction which the Court might issue at this time.

Even in those cases where parties are named in the petition for injunction, they are not bound by the decree unless they were served with process. *Hitchman Coal Co. v. Mitchell*, 245 U.S. 229, 234 (1917); *Chase National Bank v. Norwalk*, 291 U.S. 431, 437 (1934); *Scott v. Donald*, 165 U.S. 107, 117 (1897). In the latter case, the Court said: "The decree is also objectionable because it enjoins persons not parties to the suit." 165 U.S. at 117.

*Stoppage of Production from Existing Wells Would Be Against Public Policy and Detrimental to the Best Interests of the State and Nation*

The issuance of an injunction by a court of equity is a matter of discretion. *Yakus v. United States*, 321 U.S. 414, 440-441 (1944); *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4, 10-11 (1942); *Virginia Ry. v. American Federation of Labor*, 300 U.S. 515, 552 (1937); *Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935); *Harrisonville v. Dickey Clay Co.*, 289 U.S. 334, 338 (1933). Where public interest would be adversely affected, the courts generally do not grant an injunction. "Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherence of the public interest than they are accustomed to go when only private interests are involved." *Virginia Ry. v. American Federation of Labor, supra*, quoted with approval in *Yakus v. United States, supra*.

In the present case, the public interest would be harmed by the granting of an injunction preventing

the lessees of the State from continuing their production from wells already drilled, just as it was against the public interest to stop the production of California's lessees in the *California* case.

As stated in the stipulations entered into between the Federal Government and the State of California after the decision in the *California* case:

> ". . . it is in the mutual interest of the parties and of the general public, pending the establishment of a line of demarcation, that the production of oil or gas from wells now in production shall continue and not be interrupted, and also that new wells be drilled in said tide and submerged lands wherever necessary to prevent drainage by wells drilled in other lands, or to protect the respective interests of either of the parties hereto. . . ."[3]

In explaining the situation to the President, Attorney General Clark wrote:

> "The opinion of the Supreme Court last June gave rise to a variety of unusually complex problems. The most pressing of these was the urgent need of assuring continued oil production in the coastal waters off California. Continued oil production was necessary in the interest of the United States, inasmuch as the closing down of the wells would have resulted in seepage, loss of the oil and damage to wells and equipment. There was also a shortage of petroleum products, and oil producers generally were being urged by the Government to make every

[3] Appendix B, Decree Proposed by the United States, p. 13, United States v. California.

effort to increase production for military as well as civilian purposes."[4]

No injunction has yet been issued by this Court against California or its lessees because of this great public interest in the continuation of oil production from existing wells on State leases.

Until such time as Congress gives the appropriate entity the authority to lease and develop the submerged lands off the coast of Texas, the production of oil from these lands should not be interrupted at a time when a national emergency might require the availability on short notice of all the nation's oil potential. If production from the wells is stopped, it will mean in some cases the complete loss of this potential until such time as new wells may be drilled. Some wells cannot be shut down indefinitely and then reopened. This stoppage and possible loss of some of the present wells would be detrimental to both the State and Nation.

The denial of an injunction at the present time and until Congress acts, or intervening circumstances warrant, would be in keeping with the reasoning on which the Court has based its opinions in the *California*, *Texas*, and *Louisiana* decisions. The continuing production from these wells would not hamper the United States in its conduct of national

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[4] Letter from Attorney General Tom C. Clark to President Truman, October 30, 1947. Supplemental Statement and Brief for the State of Texas in Support of Objections to Motion of the United States for Leave to File Complaint, p. 33.

defense or foreign affairs but would more likely be of aid should a more serious international emergency develop.

As has been recognized by federal officials, there is no agency of the government which is authorized to take over the development of these lands. In the stipulation between the United States and California, pursuant to the opinion in *United States v. California*, it was stated:

> "The President recognizes that in event the decision of this Court is favorable to the United States, it will be necessary to have Congressional action looking towards the future management of the resources of this area."[5]

The Department of Interior has determined that the mineral leasing act does not give the Department authority to lease submerged lands. (Opinion of the Department of Interior, of August 8, 1947). This opinion was concurred in by a letter opinion of the Attorney General dated August 29, 1947.

It is therefore respectfully submitted that if any injunction issues, it should not include the State's lessees, who are producing under leases granted prior to the filing of this suit, because (a) they are not parties to the suit, and (b) stoppage of production from existing wells would be against public policy and detrimental to the best interests of the State and Nation.

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[5] Appendix B, Decree Proposed by the United States, p. 14, United States v. California.

**3. The period of accounting should date from the decision in United States v. Texas, June 5, 1950, or, in the alternative, from the date the complaint was filed, May 16, 1949.**

Paragraph 3 of the proposed decree provides that the United States is entitled to an accounting from the State of Texas "of all or any part of the sums of money derived by the State from the area described in paragraph 1 hereof subsequent to June 23, 1947."

By choosing the date of June 23, 1947, plaintiff admits that it is not entitled to an accounting dating from the entry of Texas into the Union. The reason that no such claim for an accounting could be successfully advanced is made clear by the following statement by this Court in *McKnight v. Taylor*, 1 How. 161, 168 (1843):

> "In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscure by time, and the evidence may be lost. The rule upon this subject must be considered as settled by the decision of this court in the case of *Piatt v. Vattier*, 9 Peters, 416; and that nothing can call a court of chancery into activity but conscience, good faith, and reasonable diligence; and where these are wanting, the court is passive and does nothing; and therefore, from the beginning of equity jurisdiction, there was always a limitation of suit in that court."

That this rule would be applicable to an action by the United States in a court of equity is shown by *Walker v. United States*, 139 Fed. 409, 412 (C.C.M. D. Ala. 1905), where the Court said:

> "It is conceded that the money the government now seeks to recover by its counterclaim was illegally paid out, that the United States cannot be defeated or barred of its rights by the mere laches of its agents, that it cannot be estopped by the unauthorized acts of its accounting officers, that it is not subject to the statute of limitations, and that the unauthorized acts of his agents never bind the sovereign. It is, however, equally true, when the sovereign becomes an actor in a court of justice, especially in an action which proceeds on equitable principles, that his rights must be determined upon those fixed principles of justice which govern between man and man in like situation, and that the sovereign will be bound, as an individual would be, by his own acts, or by (what is the same thing) acts of his agents lawfully done within the purview of the authority he commits to them."

This rule was recognized by the United States in the *California* case where plaintiff sought no accounting from the State of California prior to the date of this Court's decision in that case. By the same token, the date of the decision in the present case, June 5, 1950, should be the beginning date of accounting.

The government takes the position that the *California* decision in 1947 was sufficient notice to the State of Texas of the rights of the United States as against Texas in this area. No authority is cited in

support of the proposition nor could any be cited, for there is no case holding that an accounting will begin from the time of a decree in another case to which defendant was not a party or in any way bound by the decree.

The opinion of this Court in *United States v. California* was not *res judicata* as to Texas, nor was it binding in any way on the rights of Texas so as to give notice to the State of the rights and powers of the United States in the submerged lands off the coast of Texas. The State of California had no interest in its marginal belt other than that which it acquired upon becoming a State. On the other hand, as recognized by this Court, Texas, as an independent nation, had full rights of ownership and sovereignty in and over the lands and minerals in the marginal belt within its seaward boundary at the time of its admission into the Union. The United States gained no interest in these lands and minerals except what it acquired from the Republic of Texas upon annexation.

That the decision in the *California* case was no notice as to Texas is further demonstrated by statements of leading officials of the United States.

Mr. Justice Clark, while Attorney General of the United States, testified that on the day he argued the *California* case in this Court, March 13, 1947, he handed the press a written statement as to other States which contained these words as to Texas:

> "Whatever the decision of the Court may be in the California case it would not be decisive as to the rights of any other State. . . . Other

coastal States are on an entirely different footing.

". . . Texas had been an independent nation, a republic, for ten years before joining the Union. As a republic it owned all of the lands within the boundaries, including the marginal sea commonly called tidelands. This area similar to that involved in the California case extended into the Gulf of Mexico and was under the sovereignty of Texas during the Republic and was retained by it under the provisions of the Act of Admission."[6]

More than a year later, Mr. Justice Clark, while still Attorney General, continued to recognize the different status of Texas when he said that his department was still "studying" the matter of asserting title against Texas. He admitted that "Texas has a special defense. . . . I still feel that Texas has special rights."[7]

The fact that the government waited a year and a half after the *California* decision to bring suit

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[6] Joint Hearings Before the Committees on the Judiciary on S. 1988 and Similar House Bills, 80th Cong., 2d Sess. 689 (1948).

Former Interior Secretary Harold L. Ickes said after the *California* decision:

"Parenthetically, Texas may have the legal right to its tidelands because it came into the Union voluntarily and as an independent country." Address over ABC Network, October 14, 1948.

The President himself said:

"'Texas is in a class by itself; it entered the Union by Treaty." Speech at Austin, Texas, September 20, 1948.

[7] Joint Hearings Before the Committees on the Judiciary on S. 1988 and Similar House Bills, 80th Cong., 2d Sess. 616-617, 689 (1948).

against Texas indicates that it also had doubts as to the applicability of the *California* case to Texas. If the rights of the United States to the lands and minerals off the coast of Texas had been made clear by the *California* decision, as the government would now imply, there is no doubt that the United States would have filed its suit earlier against Texas or would have given the State notice that the United States regarded the submerged lands and minerals off the coast of Texas as its property and that it intended to hold the State accountable for all revenues received therefrom. Instead, no suit was filed and no notice given, and the State proceeded to grant leases in this area and collect the monies therefrom for its public school fund on a good faith belief in its title and in reliance upon the inaction of the United States.

The closely divided vote (4-3) by which this Court reached its decision attests the strength of the Texas claim and the reasonableness of the State's reliance upon it despite the *California* decision. The majority opinion states:

> "But there is a difference in this case which, Texas says, requires a different result. That difference is largely in the preadmission history of Texas." 339 U.S. at 712.

It would be more inequitable and unfair to the State of Texas to require it to account from the date of the *California* opinion than it would have been to require California to account from the date the first Federal claims were asserted against that State in 1938. No claim was asserted against Texas until

this suit was filed. A precedent was set in the *California* case against requiring accounting prior to the date of the decision against that State. It should not be departed from in this case.

> *If the date from which the accounting is to begin is not the date of the Court's opinion in this case, in no event should it be prior to May 16, 1949, the date of the filing of the complaint herein.*

As stated in 1 C.J.S., Accounting, Sec. 41b (2),

> "A person in the adverse possession of property, but with the tacit consent and acquiescence of the owner who negligently delays to call him to account, is not bound to account for rents and profits beyond the filing of the bill for an accounting. . . ."

This rule has its origin in early English Chancery practice and has been recognized by this Court and other courts in this country. In 1 Maddock, *Chancery Practice* 91 (4th Am. Ed. 1932) the rule is stated as follows:

> "With respect to the account ordered of rents and profits of estates, in these and similar cases, the rule appears to be, that where a man brings a bill in equity, in respect of a trust, and upon a mere equitable title, he will in equity recover the estate; but as upon a legal title no more than six years mesne profits are recoverable at law, so where an estate in trust is recovered in

equity, the account of rents and profits is not extended beyond six years; and *under special circumstances the court will only decree an accounting of rents and profits for the time of filing the bill, as where defendant had no notice of plaintiff's title*, nor had the deeds and writing in his custody, in which the plaintiff's title appeared, or where the title of the plaintiff appeared by deeds in a stranger's custody. *So, where there hath been any default or laches in the plaintiff in not asserting his title sooner and he has lain by, the court has often thought fit to restrain it to the filing of the bill.*" (Emphasis supplied.)

Early English cases following this rule are *Edwards v. Morgan*, 1 M'Cle. 541 (1824); *Pettiward v. Prescott*, 7 Ves. 541 (1802); *Bowes v. East London Waterworks*, 3 Madd. 375 (1818); *Drummond v. Duke of St. Albans*, 5 Ves. 433 (1800).

One of the first cases in this country recognizing the rule is *Green v. Biddle*, 8 Wheat. 1, 78 (1823). In that case the Court cited with approval the statement of the rule by Maddock and thus indicated that in a proper case the Court would confine an inattentive plaintiff to the time of filing his bill.

In *Roosevelt v. Post*, 1 Edw. Ch. 579 (N.Y. 1833), the principal question was as to the period from which the account should commence. In dealing with this question the court said:

"I think it is the fair inference, from the facts stated by the master, that for the period of about twelve years, the defendants received the wharfage (being in the nature of an in-

corporeal hereditament) by virtue of their several ownerships of the contiguous lots of land, without any idea of accountability to the complainant; and this too, with the knowledge of the latter; and he asserting no right. Nor was there any fraud or attempt to conceal from him a knowledge of his rights. And there is no circumstance to show, that any portion of the wharfage was received in trust for the complainant or deemed to be so received either by him or any of the defendants.

"The defendants must be looked upon as enjoying this income or revenue among themselves adversely to any rights of the complainant; and tacitly by his consent and acquiescence. And in such cases, the rule appears to be well established in equity, that the party shall have no account beyond the filing of his bill. [Citations.]

". . .

"The present case clearly falls within the principle of those which, without reference to the statute of limitations, restricts the right of the party to an account for the period of time subsequent to the filing of his bill. These defendants may have received money to which they were not legally or equitably entitled: but they have been suffered to take it upon the supposition of the same belonging to them; and this supposition was induced by the long acquiescence or remissness of the party, who now, for the first time, asserts a claim. The money may have been expended in a manner which it would not have been, had the defendants not supposed it to be their own; and there may be more hardship and injustice, from a variety of considerations, in compelling them to account and refund, than in leaving the negligent party to the

consequences of his own remissness." 1 Edw. Ch. at 581-583.

This Court, in *Williams v. Gibbes*, 20 How. 535 (1858), approved this rule restricting an account to the time suit is begun where plaintiff places himself within the special circumstances mentioned above. This was a suit to recover the proceeds of the share of plaintiff's intestate in a company which had a claim against the Mexican government, an award having been made under the treaty of 1839. Plaintiff made no claim for his share in the company (originally worth $2,000, later worth about $41,-000) nor did his representative until the bill was filed. In allowing in the account the costs and fees paid to counsel by defendant executors, the Court cited both *Green v. Biddle, supra*, and *Roosevelt v. Post, supra*, saying the principle of those cases is applicable "where the person in possession is a bona fide purchaser, and there has been some degree of remissness, or negligence, or inattention, on the part of the true owner, in the assertion of his rights."

It is submitted that the facts of the present case require an application of this rule. For over 100 years the United States had knowledge of the adverse claim and activities of Texas in this area. During this time no protest was made by the United States to the action on the part of Texas, and no claim was made to any of the monies being received by Texas from the area. As shown above, even after the decision in the *California* case, responsible federal officials recognized that Texas' claim to this area might be a valid one. Under such circumstances the

date of the *California* decision, June 23, 1947, is of no significance in determining the period of an accounting by Texas.

It is respectfully submitted, therefore, that the date to be set out in paragraph 3 for the beginning of the accounting period should be June 5, 1950, the date of the opinion in this case, or, in the alternative, May 16, 1949, the date of the filing of the complaint.

**4. Paragraph 3 should clearly state that the existence and extent of Texas' liability, if any, for money received is yet to be determined and should provide the means for such determination.**

Paragraph 3 of the proposed decree would provide that the United States is entitled to an accounting from the State "of all or any part of the sums of money derived by the State from the area . . . which are properly owing to the United States under the opinion entered in this case on June 5, 1950, this decree, and the applicable principles of law."

Plaintiff's memorandum, page 7, apparently interprets the intent and effect of this wording as leaving open, for future agreement of the parties or further proceedings, the determination of the existence and extent of Texas' liability, if any, for money received from the lands in controversy.

If this interpretation of the intent and effect of this part of the proposed paragraph is correct, defendant has no objection thereto, except to suggest that this meaning should be more clearly stated and that a means for such determination should be pro-

vided in the decree in the event the parties cannot agree. To accomplish this purpose, defendant requests the addition of the following sentence to paragraph 3:

> "If within 90 days from the entry of this decree, the parties have not agreed upon the existence and extent of any liability claimed by the United States for monies received by Texas, the Court, upon motion of either party, will name a master to make such determination."

Defendant's response to paragraph 3 is based upon its continued assumption that the Court did not by its opinion and will not by this decree make any determination of monetary liability against the State of Texas; that such a determination, being incidental to the principal cause of action, requires future hearings by the Court or a master appointed for that purpose if agreement of the parties is not reached; and that the proper time to raise its defenses to the existence and extent of any monetary liability claimed by plaintiff will be at a hearing held for that purpose.

Respectfully submitted,

PRICE DANIEL
*Attorney General of Texas*
J. CHRYS DOUGHERTY
JESSE P. LUTON, JR.
K. BERT WATSON
DOW HEARD
B. THOMAS MCELROY
*Assistant Attorneys General*

October 31, 1950.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950

No. 13, Original

UNITED STATES OF AMERICA,
*Plaintiff*

*v.*

STATE OF TEXAS,
*Defendant*

## DEFENDANT'S PETITION FOR REHEARING DIRECTED TO THE COURT'S AMENDED OPINION


PRICE DANIEL
*Attorney General of Texas*
J. CHRYS DOUGHERTY
JESSE P. LUTON, JR.
K. BERT WATSON
DOW HEARD
B. THOMAS MCELROY
*Assistant Attorneys General*

ROSCOE POUND
JOSEPH WALTER BINGHAM
MANLEY O. HUDSON
JAMES WM. MOORE
CHARLES CHENEY HYDE
*Of Counsel.*

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UNITED STATES OF AMERICA,
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*v.*

STATE OF TEXAS,
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## DEFENDANT'S PETITION FOR REHEARING DIRECTED TO THE COURT'S AMENDED OPINION

The State of Texas hereby petitions the Court for a rehearing of this cause and reconsideration of the majority opinion as amended.

### PRELIMINARY STATEMENT

In its original opinion of June 5, 1950, the Court declined to give effect to, or hear evidence on, the meaning of the terms of the Annexation Agreement between the United States and Texas, one of which provided that "all the vacant and unappropriated lands lying within its limits" were to be retained by the State.

The reason given by the Court for its conclusion "that no such hearing is required in this case" was stated as follows: "We are of the view that the 'equal footing' clause of the Joint Resolution annexing Texas to the Union disposes of this phase of the controversy." The majority opinion referred to and quoted an "equal footing" clause contained in Section 3 of the Annexation Resolution of March 1, 1845.

In its petition for rehearing, Texas pointed out that Section 3 of the Annexation Resolution was an alternative plan which was different from the adopted Sections 1 and 2 as to lands, debts, and "equal footing," and that it was deliberately discarded in favor of Sections 1 and 2.[1] Thereupon, the Court, in its order of October 16, 1950, amended its opinion in four places so as to remove all references to the Annexation Resolution of March 1, 1845, as containing an "equal footing" clause and so as to refer instead to the subsequent formal Admission Resolution of December 29, 1845, the words of which were not submitted to or accepted by Texas.

By this action the Court, which had originally recognized that the basis of its decision should be the

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[1] The discarded Section 3 contemplated transfer of "the remaining Texan territory to the United States," assumption of Texas' public debt by the United States, and "admission on an equal footing with the existing states."

Sections 1 and 2, which were actually submitted to and accepted by Texas and which contain all the terms finally agreed upon, provided that Texas should retain "all the vacant and unappropriated lands lying within its limits," pay its own public debt, and "be admitted as one of the states of this Union." Significantly, the "equal footing" provision was omitted from Sections 1 and 2.

Annexation Agreement approved by both the United States and Texas, has shifted to a unilateral and purely formal act passed at a later date by the Congress of the United States and never agreed to by Texas.

These amendments to the opinion do not correct the basic errors originally complained of. Instead, they present further errors, equally serious, which require a rehearing of this cause.

## ARGUMENT

### I.

**The Court has erred in basing its amended opinion on the formal Admission Act and in disregarding, and refusing to hear evidence on, the "proposals, conditions, and guarantees" of the Annexation Agreement, one of which provided that Texas shall "retain all the vacant and unappropriated lands lying within its limits."**

The Court assumes that Texas, as a Republic, "had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held." The Court adds, "In other words, we assume that it then had the *dominium* and *imperium* in and over this belt which the United States now claims." *United States v. Texas*, 339 U. S. 707, 717 (1950).

It remains undisputed in this case that under the laws of the Republic of Texas the ownership (*domin-*

*ium*) of the land and minerals within the marginal belt inside Texas' original boundaries was held by the Republic in trust for its people separately and apart from its paramount governmental powers (*imperium*) over the same area. These were separate and severable under Texas law and under then existing international law.[2]

It is undisputed that one nation may join another under an agreement by which it retains the ownership (*dominium* and economic use) of its marginal belt land and minerals and yet transfer its paramount governmental powers (national sovereignty) to the other nation. It is conceded by the Court that States may make special agreements with the Federal Government, relative to property within their borders.

It is undisputed that the United States and Texas entered into a specific agreement relative to future ownership of lands within the boundaries of Texas. It is undisputed that this entire agreement was contained in "proposals, conditions, and guarantees" tendered to Texas by the Congress of the United States in the *Joint Resolution for Annexing Texas to the United States*, dated March 1, 1845.[3]

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[2] The authorities are reviewed in defendant's original Petition for Rehearing, pp. 36-39, 42-49. See also Joint Memorandum in Support of Rehearing appended thereto at page 51 and signed by Joseph Walter Bingham, C. John Colombos, Gilbert Gidel, Manley O. Hudson, Charles Cheney Hyde, Hans Kelsen, William E. Masterson, Roscoe Pound, Stefan A. Riesenfeld, and Felipe Sanchez Roman, and concurred in by William W. Bishop, Jr.

[3] 5 Stat. 797. A copy appears in Texas' Brief, Appendix, pp. 58-60.

These specific terms were repeated in full and accepted by the Texas Congress on June 23, 1845, in a "*Resolution Giving Consent of the Existing Government to the Annexation of Texas to the United States* . . . on the terms, guarantees, and conditions" submitted by the United States.[4]

These specific terms were accepted by the people of Texas in convention assembled on July 4, 1845, through an ordinance assenting to "*the proposals, conditions, and guarantees*" tendered by the aforementioned resolution of the United States Congress.[5]

It is undisputed that all the "*proposals, conditions, and guarantees*" submitted by the United States Congress and accepted by Texas were contained in the documents heretofore mentioned. As admitted by plaintiff, "the specific terms" for the annexation of Texas were contained in Sections 1 and 2 of the resolution of March 1, 1845, which were quoted in full in Texas' acceptance resolution of June 23, 1845, and convention ordinance of July 4, 1845. There were no other "proposals, conditions, and guarantees" submitted by the United States Congress to Texas or accepted by Texas. Together, the aforesaid documents constituted the entire Annexation Agreement and contained the entire bargain entered into by the two independent nations.

It is undisputed that none of these three documents contained any cession or conveyance of the land and minerals in controversy from Texas to the

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[4] 2 Gammel's Laws of Texas 1225. A copy appears in Texas' Brief, Appendix, pp. 60-62.

[5] 2 Gammel's Laws of Texas 1228. A copy appears in Texas' Brief, Appendix, pp. 62-63.

United States, and none contained any agreement concerning "equal footing" or concerning the Court's theory of coalescence of Texas' property rights therein with national sovereignty. To the contrary, it is undisputed that these three documents each contained as part of the "proposals, conditions, and guarantees" the following specific agreement:

> "Second—said state, when admitted into the Union . . . *shall also retain all the vacant and unappropriated lands lying within its limits,* . . ."[6]

Counsel for Texas contended that this retention of "all the vacant and unappropriated lands lying within its limits" is conclusive against the claim of the United States, since it is one of the specific "proposals, conditions, and guarantees" agreed upon and the only specific term relating directly to the subject matter of this controversy. Texas further contended that the dispute raised by counsel for the United States as to whether this retention clause included the land in controversy should in no event be resolved against Texas without giving the State an opportunity to develop the evidence as to the meaning and intention of the parties and their 104 years of contemporary and subsequent construction.

It should be highly significant to the Court that counsel for the United States did not contend, either in their brief or oral argument, that the United

[6] The Court recognizes that the "limits" of the Republic of Texas at the time of this agreement included the land in controversy, the southern boundary reading: "beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande." 339 U.S. at 713.

States was entitled to judgment if the parties intended the retention clause to cover the lands in controversy. In their brief, counsel for the United States were quite frank and fair in their assumption that Texas would be entitled to prevail if the retention clause was intended to include the lands herein sued for.[7]

In spite of this, the Court has completely disregarded the specific retention clause referring to lands. In denying Texas the right to introduce evidence and in deciding the case for the United States on the pleadings alone, the Court has given no effect whatever to the three documents which contain the "proposals, conditions, and guarantees" agreed upon by the United States and Texas.[8] The

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[7] In its brief under Point II, A, plaintiff devoted 30 pages of its 61 pages of argument to an attempt to show that this property was not intended to be included within the retention clause. The next 11 pages, Point II, B, were devoted to an argument that the transfer of this property is evidenced by the transfer of national sovereignty and by an alleged "equal footing." *However, the conclusion sought by this entire argument was frankly admitted to be proper only if the Court should find that the retention clause was inapplicable to this property.* In this connection plaintiff said: "We assume, throughout Point II, B, that the 'vacant and unappropriated lands' clause is inapplicable for any or all of the reasons given in Point II, A, *supra*." Plaintiff's Brief in Support of Motion for Judgment, p. 54, n. 28.

[8] These three documents which constitute the Annexation Agreement, as distinguished from the Admission Act, are:

1. The Annexation Resolution of March 1, 1845 enacted by the Congress of the United States.

2. The Resolution of the Congress of Texas, June 23, 1845, consenting to annexation upon the terms set out in the Annexation Resolution of March 1, 1845.

3. The Ordinance adopted by the people of Texas in convention assembled, July 4, 1845, assenting to annexation upon the terms set out in the Annexation Resolution of March 1, 1845.

Court's opinion, as amended by its order of October 16, 1950, contains no reference to any of the three documents which constitute the agreement, except in its preliminary statement of the contentions of the parties.

No word, phrase, term, or condition of the Annexation Resolution is relied upon or referred to by the Court as bearing upon or influencing its decision. Instead, the Court bases its amended opinion entirely upon an "equal footing" clause contained in a fourth document, which was a separate and subsequent unilateral Act of the United States Congress formally admitting Texas into the Union.[9] This Act, passed more than six months after the "proposals, conditions, and guarantees" had been agreed upon by the resolutions of the United States Congress, the Texas Congress, and the Texas Convention, did not purport to change or add to the agreement theretofore made. As said by President Polk, it was passed as a "matter of course," a mere formality, to carry out what the United States Congress by the resolution of March 1, 1845, had already agreed to do.[10]

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[9] 9 Stat. 108. A copy appears in Texas' Brief, Appendix, pp. 63-64.

[10] In a letter to General Sam Houston, dated June 6, 1845, President Polk wrote:

> "If she [Texas] accepts unconditionally, the great measure of the re-union of the two countries will be placed beyond danger and *may be regarded as consummated, for the next session of Congress as a matter of course*, will redeem the National faith and admit her into our Union."

On June 15, 1845, President Polk wrote Andrew Donelson, United States chargé d'affaires, who was negotiating the agreement:

> ". . . the conventions of Texas should on the day they meet pass a general resolution accepting our terms of annexation. The moment they do this I shall regard Texas as a part of our Union. . . ."

Nothing in the unilateral Act of Admission could nullify that agreement. The "proposals, conditions, and guarantees" actually submitted to the Republic of Texas left no room for further negotiation. Under Sections 1 and 2, the Republic of Texas was given no option as to the basis of annexation. Texas was free only to accept or reject the named "proposals, conditions, and guarantees," within the time specified.

If Texas chose to accept the offer, the Republic *and* its people were required to go beyond the mere act of manifesting assent. Acceptance involved performance of acts whereby the Republic of Texas was transformed into the State of Texas. By Acts of the Texas Congress *and* adoption by the people of a state constitution, the compact was at once entered into and by Texas *performed*. Thenceforth the compact was not merely executory, it was executed. It remained only for the United States, by its Congress, to recognize the act of acceptance *and* performance as a *fait accompli*. The Republic of Texas and its people, having in this manner accepted the terms, conditions, and guarantees of annexation were by that act transformed into the State of Texas. It was too late then for them to turn back. And when the Congress of the United States by the Joint Resolution of December 29, 1845, recognized that fact, by the same token it perforce recognized also that the terms, conditions, and guarantees of annexation were those contained in the offer of March 1, 1845, no more and no less. Indeed, the Admission Act of December 29, 1845, in express terms stated that this was the basis of the annexation. The Congress had reserved no power to change it, and nothing that was

done at that time was effective to change it. Consequently, it is utterly wrong to turn the decision upon what are now interpreted as new terms added on December 29, 1845. If they were intended to import a new meaning, different from that previously agreed upon, Texas had no opportunity to assent to them and did not assent to them.

Far from altering or adding to the terms and conditions already agreed upon, this unilateral Act of Congress specifically recited that the admission of Texas was theretofore consented to by Congress "upon certain conditions specified in the first and second sections of said Joint Resolution [of March 1, 1845]" and that "the people of the said Republic of Texas . . . assented to and accepted the proposals, conditions, and guarantees contained in . . . said resolution." Nothing could be clearer from the words of the Admission Act of December 29, 1845, than that the United States was formally admitting Texas in accordance with the "proposals, conditions, and guarantees" theretofore agreed upon.

Therefore, it remains essential to a final and fair determination of this case to decide what the parties meant by the condition and guarantee in the Annexation Agreement that Texas was to retain "all the vacant and unappropriated lands lying within its limits." If the Court should hear the evidence and decide that the United States Congress and the Texas Congress meant and intended by this clause to include the lands in controversy the same as all other unsold lands, the Court would be compelled to deny plaintiff's motion for judgment.

It would be imputing a dishonest act to the United States Congress of 1845 to say that after agreeing in its Annexation Resolution that Texas retain *all* lands lying within its limits, both upland and submerged, it then tagged on an "equal footing" clause in its unilateral act of admission with the intent to take away from Texas 2,608,774 acres of those lands. Obviously, the formal Act of Admission was not intended to work this shift in ownership because it was never even submitted to Texas. Since "equal footing" formed no part of the "proposals, conditions, and guarantees" previously agreed upon by the United States and Texas, its inclusion in the formal Act by the United States alone could not mean that a transfer of Texas' ownership of these lands was thereby accomplished.

As hereinafter shown, Texas has accumulated an abundance of evidence which will convince this Court that the United States Congress did not intend any such effect as is now given by the Court to the "equal footing" clause in the formal Act of Admission, if the Court will but give defendant an opportunity to introduce the evidence.

Likewise, as heretofore insisted, Texas has a great amount of evidence which it believes would convince the Court that the parties intended the lands in controversy to be included within the specific retention of "all vacant and unappropriated lands lying within its limits." At least, Texas should be given the opportunity to present the evidence rather than have its case foreclosed by the harsh remedy of summary judgment on the pleadings alone.

Let us illustrate the point involved here with a hypothetical case. Suppose Canada agreed to become annexed to the United States under circumstances and documents exactly like those involved in the Texas annexation except that the retention clause in Canada's annexation agreement read:

> "Second—said state, when admitted into the Union .... shall also retain all vacant and unappropriated lands lying within its limits, including the lands beneath its marginal belt three leagues from shore."

After that agreement had been consummated by the two nations, could it be contended that a subsequent formal act admitting Canada to the Union "on an equal footing with the original States" would divest her of the marginal belt lands which it had been agreed that she should keep? The answer is obvious.

The only difference between the foregoing hypothetical case and the Texas case is that the Texas retention clause, although equally broad and inclusive, does not in terms explain that it is meant to include the marginal belt lands "within its limits." But Texas pleads and can show by evidence that the United States Congress and the Texas Congress intended the retention clause to include the marginal belt lands no less than if they had been specifically mentioned as being included therein. With such evidence before the Court, Texas' defense to this lawsuit would be as strong as Canada's in the hypothetical case above stated. Denial of the opportunity to lay such evidence before the Court amounts to denial

of the right to present a defense which would decide this case in its favor.

Here there is a dispute as to the meaning of the Texas retention clause simply because plaintiff has urged that it was not intended to cover the lands in controversy. Texas says that the clause was meant to be as inclusive as it was written and that it can show by diplomatic correspondence, usage, contemporary and subsequent construction, and other evidence that the parties intended it to include these lands.

This Court, in its majority opinion, clearly states the rule which should apply to this situation, as follows:

> "The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of facts. *United States v. Texas*, 162 U. S. 1; *Kansas v. Colorado*, 185 U.S. 125, 145, 147; *Oklahoma v. Texas*, 253 U.S. 465, 471. If there were a dispute as to the meaning of documents and the answer was to be found in diplomatic correspondence, contemporary construction, usage, international law and the like, introduction of evidence and a full hearing would be essential." 339 U.S. at 715.

Yet the Court thus far has denied Texas the right to introduce evidence and a full hearing on the disputed meaning of the clause which could require a decision of this case in its favor.

The possibility of Texas' evidence convincing the Court that the parties meant for the retention clause

to cover these lands is apparent from the fact that Mr. Justice Reed said in his dissenting opinion, "I think it does include those lands. . . . At least we should permit evidence of its meaning." He was joined in this by Mr. Justice Minton. Mr. Justice Frankfurter wrote, "How that shift [of lands from Texas to the United States] came to pass remains for me a puzzle." Mr. Chief Justice Vinson said from the bench during oral argument:

> "But they say, 'You can keep your vacant and unappropriated lands to pay your debt. If there is anything left over, it is yours.' . . . And the rest of it, whatever it is, that is what is here, as to whether or not the land in the marginal sea is in the residue."[11]

From the evidence developed in the case of *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1948), this Court held that Congress' use of the term "public lands which are actually occupied by Indians and Eskimos" within the Alaskan territory was broad enough to include coastal waters "3,000 feet from the shore line at mean low tide." The intent of Congress was determined largely by evidence relating to the character and purpose of the reservation, importance of fisheries to the Alaskan natives, an administrative determination, and other evidence similar to that which Texas seeks to offer showing that its retention of lands covered the marginal belt area "lying within its limits."

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[11] Reporter's Transcript of Argument, *United States v. Texas*, pp. 26-27.

The State of Texas seeks here the same opportunity to present evidence as was afforded the Secretary of the Interior on behalf of the Indians and Eskimos in *Hynes v. Grimes Packing Co.*

It is respectfully urged that the Court erred in its amended opinion by giving controlling effect to a clause in the formal Admission Act and in thereby disregarding, and declining to hear evidence on, the meaning of the "proposals, conditions, and guarantees" of the Annexation Agreement, one of which was that Texas

> ". . . shall also retain all the vacant and unappropriated lands lying within its limits."

II.

**Since there is a dispute as to the meaning and intent of the clause in the Admission Act upon which the Court's amended opinion is based, the Court has erred in refusing to hear evidence and in deciding the issue by summary judgment.**

In addition to the right to introduce evidence as to the intention of the parties to the three documents which contain the terms of the Annexation Agreement, defendant is entitled to develop the evidence which will show that in using the words "equal footing" in the formal Admission Act the United States Congress did not mean or intend thereby that ownership of the lands in controversy should pass from

Texas to the United States or that it should coalesce with national sovereignty.

The State has raised both of the foregoing defenses by special affirmative pleading. In its first amended answer, after quoting from the three documents which constituted the Annexation Agreement and also from the formal Admission Act, Texas alleged:

> "By these acts on the part of the United States and the Republic of Texas, when construed, as they must be, in the light of the intention of the contracting parties, there was a binding agreement between the two independent sovereigns that upon annexation Texas would not cede to the United States any, but that the newly created State would retain all, of the lands, minerals, and other things lying beneath that part of the Gulf of Mexico within the original boundaries of the Republic. . . ."

Texas earnestly insists that it can prove by diplomatic correspondence, speeches, congressional records, contemporary and subsequent construction, usage, and other evidence the following:

a. That the United States Congress, in using the term "equal footing" in the formal Admission Act of December 29, 1845, intended it to apply only to political rights and considered ownership of marginal belt lands entirely separate and severable from paramount national political rights over the area.

b. That the United States Congress did not mean

or intend the "equal footing" clause in the formal Admission Act to accomplish a transfer of ownership of the property in controversy or a coalescence thereof with national sovereignty.

c., That the meaning of the term "equal footing" as intended by Congress in the Admission Act was not in conflict with, but in complete harmony with, the retention of these lands by Texas in accordance with the "proposals, conditions, and guarantees" of the Annexation Agreement theretofore consummated.

Texas, by its pleadings and by its brief, positively disputes the Court's interpretation of the meaning and intention, as well as the effect, of the use of the words "equal footing" in the formal Admission Act. Under the rule stated by this Court, quoted on page 13, *ante*, defendant should be permitted to introduce evidence in support of a contrary meaning which it affirmatively alleges to have been intended.

The majority opinion states that there is no need to take evidence to establish the meaning of "equal footing" which it applies to this case. The Court says that its interpretation must be made here "if 'equal footing' with the various States is to be achieved." Obviously, no evidence is necessary to establish what the Court presently understands and interprets the term to mean. However, defendant alleges and can prove that when the United States Congress used the term in 1845, it did not mean or intend "equal footing" to have the effect given it

by this Court with respect to the property in controversy. The meaning of the term as it was used in 1845 and what was intended to be achieved by its use then should be controlling in this case. The effect of the term should be determined in the light of what was then understood to be its meaning. *Strother v. Lucas*, 12 Pet. 410, 439, 446 (1838); *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912); *Ross v. McIntyre*, 140 U.S. 453, 475 (1891).

Plaintiff's brief can be searched from introduction to conclusion without finding statement or argument that Texas' defenses, if supported by proof, are invalid and unavailing as a matter of law. Under such circumstances, on plaintiff's motion for judgment on the pleadings, these defenses should have been resolved in favor of the defendant and the motion overruled in order that the evidence might be heard. *Clark v. Allen*, 331 U.S. 503, 516 (1947); *National Metropolitan Bank v. United States*, 323 U.S. 454, 456-457 (1945).

## CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for rehearing and reconsideration of the majority opinion should be granted and that the majority opinion should be withdrawn and judgment rendered denying plaintiff's motion for judgment on the pleadings and granting defendant's mo-

tion for the appointment of a special master to hear the evidence.

Respectfully submitted,

PRICE DANIEL
*Attorney General of Texas*
J. CHRYS DOUGHERTY
JESSE P. LUTON, JR.
K. BERT WATSON
DOW HEARD
B. THOMAS MCELROY
*Assistant Attorneys General*

ROSCOE POUND
JOSEPH WALTER BINGHAM
MANLEY O. HUDSON
JAMES WM. MOORE
CHARLES CHENEY HYDE
*Of Counsel.*

October 31, 1950

**Certificate**

The foregoing petition for rehearing is believed to be meritorious and is presented in good faith and not for delay.

PRICE DANIEL
*Attorney General of Texas*